UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC., d/b/a U.S. FIBERS

and

Case 10-CA-139779

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

To the Honorable, the Members of the
National Labor Relations Board
Franklin Court Building
1099 14th Street, NW
Washington, DC 20570-0001

MOTION TO TRANSFER CASE TO AND CONTINUE PROCEEDINGS BEFORE THE BOARD AND FOR SUMMARY JUDGMENT

This case involves a test of certification of representative that the National Labor Relations Board (Board) issued to United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, Local 7898 (the Union) as the exclusive collective-bargaining representative of a unit of certain employees employed by Pac Tell Group, Inc., d/b/a U.S. Fibers (Respondent). Pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, and in order to effectuate the purposes of the Act and to avoid unnecessary costs and unwarranted delay, Counsel for General Counsel respectfully moves that this case be transferred to and continued before the Board, and that the Board enter summary judgment against Respondent.

In support of this motion, Counsel for General Counsel avers as follows:

1.

On March 26, 2013, the Union filed a petition in Case 10-RC-101166 seeking to represent certain employees of Respondent. A copy of the Union's petition is attached as Exhibit 1.

2.

On April 18, 2013, the Region conducted a pre-election hearing, and on May 3, 2013, the Acting Regional Director issued a Decision and Direction of Election in Case 10-RC-101166. Copies of the Decision and Direction of Election, and Affidavit of Service, are attached as Exhibits 2 and 3, respectively.

3.

On May 16, 2013, Respondent filed a Request for Review of the Region's Decision and Direction of Election. A copy of Respondent's Request for Review is attached as Exhibit 4.

4.

On May 29 and 30, 2013, the Regional office of the Board conducted an election in the following appropriate unit of employees of Respondent (the Unit):

> All full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees, employed by Respondent at its Trenton, South Carolina facility, excluding all other employees, including office clerical employees, professional and confidential employees, guards and supervisors as defined in the Act.

5.

On May 30, 2013, the Regional office counted the ballots cast in the election and thereafter issued a tally of ballots showing that there were 71 votes cast for the Union and 59 votes cast against the Union, with 7 challenged ballots, which were not

determinative of the result of the election. A copy of the Tally of Ballots is attached as Exhibit 5.

6.

On May 31, 2013, the Board issued an Order denying Respondent's Request for Review of the Acting Regional Director's Decision and Direction of Election. Copies of the Board's Order, and a Facsimile of Service, are attached as Exhibits 6 and 7, respectively. Respondent filed a Motion for Reconsideration of the Board's decision on June 14, 2013, which the Board denied by Order on June 26, 2013. Copies of Respondent's Motion and the Board's Order, and Affidavit of Service, are attached as Exhibits 8, 9, and 10, respectively.

7.

On June 6, 2013, Respondent timely filed objections to the conduct of the election in Case 10-RC-101166. A copy of Respondent's objections is attached as Exhibit 11.

8.

On June 17, 2013, the Regional Director issued a Report on Objections and Notice of Hearing in Case 10-RC-101166. A Copy of the Report on Objections and Notice of Hearing, and Affidavit of Service, are attached as Exhibits 12 and 13, respectively.

9.

On July 1, 2, and 3, 2013, a Hearing Officer conducted a post-election hearing, and on July 26, 2013, the Hearing Officer issued a Report on Objections and

Recommendation to the Regional Director. A copy of the Hearing Officer's Report on Objections and Recommendation, with appendices, is attached as Exhibit 14.

10.

On August 9, 2013, Respondent and the Union filed exceptions to the Hearing Officer's Report on Objections. Copies of Respondent's and the Union's exceptions are attached as Exhibits 15 and 16, respectively.

11.

On September 13, 2013, the Regional Director issued a Supplemental Decision and Certification of Representative in Case 10-RC-101166, certifying the Union as the exclusive collective-bargaining representative of the Unit. A Copy of the Regional Director's Supplemental Decision and Certification, and Affidavit of Service, are attached as Exhibits 17 and 18, respectively.

12.

On September 27, 2013, Respondent filed a Request for Review of the Regional Director's Supplemental Decision and Certification of Representative. A Copy of Respondent's Request for Review is attached as Exhibit 19.

13.

On March 13, 2014, the Board issued an Order granting, in part, Respondent's Request for Review of the Regional Director's Supplemental Decision and Certification of Representative. Copies of the Board's Order, and Affidavit of Service, are attached as Exhibits 20 and 21, respectively.

14.

On September 22, 2014, the Board issued a Decision on Review and Order, affirming the Regional Director's Supplemental Decision, overruling Respondent's objections, and ordering the Regional Director to take appropriate action consistent with the Board's Decision and Order. Copies of the Board's Decision on Review and Order, and Affidavit of Service, are attached as Exhibits 22 and 23, respectively.

15.

On September 23, 2014, pursuant to the Board's Decision on Review and Order, the Regional Director reissued the Certification of Representative in Case 10-RC-101166. A Copy of the Certification is attached as Exhibit 24.

16.

At all times since September 23, 2014, based on Section 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. Sec.159(a) (the Act), the Union has been the exclusive collective-bargaining representative of employees in the Unit.

17.

On October 7, 2014, the Union, by certified letter, requested that Respondent recognize the Union as the exclusive collective-bargaining representative of the Unit. A Copy of the request is attached as Exhibit 25.

18.

Since about October 7, 2014, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

19.

By certified letter dated October 14, 2014, Respondent notified the Union that it was testing certification and refusing to bargain with the Union. A copy of that letter is attached as Exhibit 26.

20.

On October 29, 2014, the Union filed a charge in Case 10-CA-139779 in which it alleged that Respondent has engaged in unfair labor practices affecting commerce as defined in the Act. The charge was served by regular mail on Respondent on October 29, 2014. Copies of the Charge, and Affidavit of Service, are attached as Exhibits 27 and 28, respectively.

21.

On November 12, 2014, the Regional Director, by the Officer-In-Charge of Subregion 11, issued a Complaint and Notice of Hearing, alleging that since about October 7, 2014, Respondent has been violating Section 8(a)(l) and (5) of the Act by failing and refusing to recognize and to bargain with the Union as the exclusive collective-bargaining representative of the Unit. A copy of the Complaint and Notice of Hearing was duly served by post-paid certified mail upon Respondent at its Trenton, South Carolina, location on November 12, 2014. Copies of the Complaint and Notice of Hearing, and the Affidavit of Service, are attached hereto as Exhibits 29 and 30, respectively. The return postal receipt for Exhibits 29 and 30 is attached as Exhibit 31.

22.

On November 19, 2014, Respondent, by its counsel, filed an Answer to Complaint and Notice of Hearing with the Regional Director. A copy of Respondent's

Answer and Certificate of Service, dated November 19, 2014, is attached as Exhibit 32. In its Answer to Complaint, Respondent admits to the allegations set forth in paragraphs 1 through 6, and paragraphs 8 and 10 of the Complaint. Respondent substantively denies only paragraphs 7, 9, 11, 12, and 13. Specifically, Respondent denies that the Unit, as described in the Complaint, is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act; that the Union has been the exclusive collective-bargaining representative of the Unit under Section 9(a) of the Act since September 23, 2014; that Respondent's refusal to recognize and bargain with the Union violates Section 8(a)(1) and (5) of the Act; and that its unfair labor practices affect commerce under the Act. Respondent further asserts that the Board improperly certified the Union and that Respondent was privileged to engage in the conduct set forth in paragraphs 11 and 12 of the Complaint.

Counsel for General Counsel respectfully requests that the Board take official and/or administrative notice of all the documents described above in Case 10-RC-101166. Based on the foregoing, Counsel for General Counsel, pursuant to Section 102.24 and 102.50 of the Board's Rules and Regulations, respectfully moves to transfer this case to the Board and to continue proceedings before the Board and for summary judgment against Respondent.

ARGUMENT

Notwithstanding Respondent's defenses, Respondent's material admissions in its Answer to Complaint require that all the allegations of the Complaint should be deemed admitted as true. Respondent is seeking to relitigate issues previously determined in the underlying representation case, Case 10-RC-101166. The Board and the courts have

consistently held that issues that were or could have been raised and determined by the Board in a prior representation case cannot be relitigated in a subsequent unfair labor practice proceeding, absent newly-discovered evidence, previously unavailable evidence, or special circumstances. Thus, a respondent in a Section 8(a)(1) and (5) proceeding is not entitled to relitigate issues that were or could have been raised in prior representation proceedings. *Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 162 (1941); *LTV Electrosystems,* 166 NLRB 938, 939-940 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Warren Unilube,* 357 NLRB No. 9, slip op. at 1 (2011); Board's Rules and Regulations Sections 102.67(f) and 102.69(c).

Respondent is testing the certification of the Union as the exclusive collective-bargaining representative of the Unit. Respondent does not assert the existence of any newly-discovered or previously unavailable evidence or special circumstances that would cause the Board to reconsider the Certification of Representative that has issued. Accordingly, Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding, and there is no need for a hearing in this matter.

As an appropriate remedy for Respondent's refusal to bargain, Counsel for General Counsel submits that, in order to accord employees the services of their selected bargaining representative for the period covered by law, the initial certification year should be construed as beginning on the date Respondent commences to bargain in good faith with the Union. *Mar-Jac Poultry Co.,* 136 NLRB 786, 786 (1962); *Lamar Hotel,* 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert denied, 379 U.S. 817.

WHEREFORE, because Respondent has failed to raise any issues of material fact requiring a hearing, Counsel for General Counsel respectfully requests that:

(A) This case be transferred to and continued before the Board;

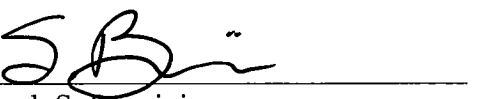
(B) The allegations of the Complaint be found to be true;

(C) This motion for summary judgment be granted; and

(D) The Board issue a Decision and Order containing findings of fact and conclusions of law in accordance with the allegations of the Complaint, and remedying Respondent's unfair labor practices by including a provision that, for the purpose of determining the effective date of the Union's certification, the initial certification year shall be deemed to begin on the date that Respondent commences to bargain in good faith with the Union, and any other relief as is deemed just and proper.

Dated at Winston-Salem, North Carolina, December 3, 2014.

Respectfully submitted,



Sarah S. Bencini
Counsel for General Counsel
National Labor Relations Board
Region 10, Subregion 11
Republic Square, Suite 200
4035 University Parkway
Winston-Salem, North Carolina 27106-2235

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Transfer Case and Continue Proceedings Before the Board and for Summary Judgment have this date been served electronically upon the following parties:

JONATHAN P. PEARSON, ESQ.
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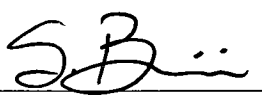
mpadias@usw.org

Dated at Winston-Salem, North Carolina, December 3, 2014.

Respectfully submitted,



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FORM EXEMPT UNDER 44 U S C

INTERNET FORM NLRB-502 (2-08)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
10-RC-101166	3/26/13

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1 PURPOSE OF THIS PETITION (if box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- ☑ **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☐ **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☐ **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.**
- ☐ **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded
- ☐ **UC-UNIT CLARIFICATION**- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) ☐ In unit not previously certified ☐ In unit previously certified in Case No _____
- ☐ **AC-AMENDMENT OF CERTIFICATION**- Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Tel No
US Fibers	Ted Oh - VP Operations & Plant Manager	803-275-5023

3 Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*	Fax No
30 Pine House Rd. Trenton, SC 29847-2010	803-275-5078

4a Type of Establishment (Factory, mine, wholesaler, etc)	4b. Identify principal product or service	Cell No
Manufacturing	Recycle Polyester Fibers	e-Mail contact@usfibers.com

5 Unit Involved *(In UC petition, describe* **present** *bargaining unit and attach description of proposed clarification)*	6a Number of Employees in Unit
Included All Production, Janitorial, Warehousemen, Shipping and Maintenance workers at the Trenton, SC plant site	Present Approximately 125
Excluded All other Managers and Supervisors as defined under the ACT	Proposed *(By UC/AC)*
(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)	6b. Is this petition supported by 30% or more of the employees in the unit?* ☑ Yes ☐ No *Not applicable in RM, UC, and AC

7a. ☐ Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state)

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent *(If none, so state.)*		Affiliation	
Address	Tel. No Cell No.	Date of Recognition or Certification Fax No.	e-Mail

9. Expiration Date of Current Contract. If any *(Month, Day, Year)*	10 If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, Day and Year)*
11a Is there now a strike or picketing at the Employer's establishment(s) Involved? Yes ☐ No ☑	11b. If so, approximately how many employees are participating?

11c The Employer has been picketed by or on behalf of *(Insert Name)* _____, a labor organization, of *(Insert Address)* _____ Since *(Month, Day, Year)* _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Address	Tel No.	Fax No.
		Cell No	e-Mail

13 Full name of party filing petition (If labor organization, give full name, including local name and number)
The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union - Local 7898

14a Address *(street and number, city, state, and ZIP code)*	14b. Tel. No. EXT	14c. Fax No.
Five Gateway Center Pittsburgh, Pa 15222	412-562-2400 14d. Cell No.	14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(to be filled in when petition is filed by a labor organization)*
The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title *(if any)*
James E. Sanderson, Jr.	James E. Sanderson, Jr.	President

Address *(street and number, city, state, and ZIP code)*	Tel. No	Fax No.
P.O. Box 777 Georgetown, SC 29442	843-461-6818 Cell No. 843-461-6818	eMail uswa7898@gmail.com

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer[1]

and

Case 10-RC-101166

UNITED STEEL, PAPER, AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Petitioner [2]

ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Pac Tell Group, Inc. d/b/a U.S. Fibers, operates two facilities engaged in the processing and manufacture of recycled polyester fiber. One facility is located in Trenton, South Carolina, and the second facility is located in Laurens, South Carolina. The Petitioner, United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance workers employed by the Employer at its Trenton, South Carolina, facility, excluding all other employees, including office clerical employees, professional and confidential employees, and guards and supervisors defined under the Act. A hearing officer of the Board conducted a hearing. The Petitioner and Employer filed post-hearing briefs, both of which have been duly considered.

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[1] The Employer's name appears as stipulated to at the hearing.

[2] The Petitioner's name appears as stipulated to at the hearing.

POSITIONS OF THE PARTIES

As evidenced at the hearing and set forth by brief, two issues were litigated: (1) the geographical scope of the unit; specifically, whether the Employer's satellite facility in Laurens, South Carolina, should be included in the unit; and (2) whether four individuals, labeled by the Employer as "Supervisors," are supervisors under Section 2(11) of the National Labor Relations Act, and should, therefore, be excluded from the unit.

The Petitioner contends the following: that the Laurens facility and Trenton facility do not share a community of interest and, therefore, should not be included in the same unit; and that the four individuals labeled as "supervisors" by the Employer are not supervisors under the Act. The Employer asserts the following: that the Laurens facility employees should be included in the bargaining unit with the Trenton facility employees; and that the four named individuals are supervisors as defined by the Act and should not be included in the unit.

The parties discussed at hearing that the number of employees at the Trenton facility was approximately 125 to 140 employees. The number of employees at the Laurens facility was approximately 17 to 20 employees. The Petitioner and the Employer agreed that they would wait to review the appropriate payroll to determine the precise number of employees at the Laurens and Trenton facilities. The Petitioner is willing to proceed to an election in any alternative unit the Region might direct.

As discussed more fully below, I have concluded that the Laurens facility does not share an overwhelming community of interest with the petitioned-for unit at the Trenton facility; and that the Employer has not met its burden of establishing that the four individuals, Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres, are supervisors as defined by the Act.

THE EMPLOYER'S OPERATIONS

A. Overview

The Employer operates two plants for the purpose of recycling polyester and manufacturing recycle fibers. The Employer buys scrap polyester, like polyester film, special fibers, non-woven, and "lump and chunk,"[3] and recycles it into useable product. The first plant is located in Laurens, South Carolina (hereafter "Laurens facility"). The second plant is located in Trenton, South Carolina (hereafter "Trenton facility"). The Laurens facility and the Trenton facility are located approximately seventy five (75) miles apart. The Employer's operation is set up to receive scrap polyester at the Laurens facility, where it is reduced and densified. The material is then packaged and sent to the Trenton facility to create the useable product. One hundred percent of the output from the Laurens facility goes to the Trenton facility to be manufactured. Approximately 25% of the material used at the Trenton facility comes directly from the Laurens facility. The Trenton facility receives the remaining 75% of its material from outside sources, directly to the Trenton facility.

B. Laurens Facility

The Laurens facility operates in a single building, which is approximately 150,000 square feet, and is situated on approximately 25 acres of land. The Laurens facility is capable of receiving scrap material, processing that material by reducing and densifying it, and packaging the material to be sent to the Trenton facility. The reduction and densifying process is done by two types of machines, an Erema and a densifier. The workers responsible for transporting the material from the Laurens facility to the Trenton facility are contracted out, and therefore are not employees of the Employer.

C. Trenton Facility

[3] "Lump and Chunk" is a waste product of the polymerization process, which resembles a glob of tar and polyester.

The Trenton facility consists of four separate buildings. Combined, the buildings cover between 500,000 to 600,000 square feet. The Trenton facility has all of the capabilities of the Laurens facility, receiving scrap material (from the Laurens facility or from other outside sources), processing the material by reduction and densifying, and packaging that material. Additionally, unlike the Laurens facility, the Trenton facility is capable of manufacturing the final product. At the Trenton facility, the Employer mixes the material, created by the reduction and densifying process, with other products to produce a backup of polymer. Once the backup of polymer is created, it is first blended and then dried for four to five hours in order to draw moisture out and crystallize the material. After the polymer is crystallized, the material is passed through the "intruder" for dye molding and sizing. The material then passes through a grinder, and finally a spinnarette and "extruder," which creates the fiber. After the fiber is created, the final step is finishing. Finishing is the process of cooling, drying, and cutting the newly created fibers. Once the fibers are finished, they are packaged and sent to the customer.

D. Supervisory Hierarchy

Vice President Ted Oh is responsible for the overall operation and financial responsibility of the Employer's business, including both the Trenton and Laurens facilities. Oh's office is located at the Trenton facility. Although Oh used to routinely visit the Laurens facility once per week up through 2010, the last time that he has gone to the Laurens facility was in 2012.

Jay Alcorta is the plant manager for the Laurens facility and the safety manager for the Trenton facility. Alcorta's office is located at the Laurens facility, where he spends two or three days a week. Alcorta goes to the Trenton facility once a week to conduct safety meetings for employees at that facility.

Kevin Corey is the director of manufacturing for the Trenton facility. Corey is responsible for the operation of the Trenton facility and answers directly to Vice President Ted

Oh. Corey's office is located in the Trenton facility. Corey travels to the Laurens plant once or twice a year. The last time that Corey was at the Laurens plant was sometime in 2012.

Production Managers Glenn Jang and Kyong Kang are in charge of production at the Trenton facility. Jang is in charge of the recycling and extrusion process, up until the fiber comes through the spinnerette. Kang is responsible for the process after the spinnerette, known as finishing. Jang and Kang answer directly to Director of Manufacturing Kevin Corey. Although Kang did not testify at the hearing, Jang testified that he rarely goes to the Laurens plant. These two managers work from 8 a.m. to 6 p.m.

The above individuals are also compensated by salary rather than compensated hourly. The parties have stipulated that the above individuals are supervisors within the meaning of Section 2(11) of the Act.

In addition, Susan Kelley is the assistant controller. Kelley is responsible for handling the payroll and benefits for employees of both the Laurens and Trenton facilities. Kelley's office is located at the Laurens facility. There is no individual employed in a like position at the Trenton facility. Assistant Administrator Crystal Busbee, located at the Trenton facility, is responsible for relaying payroll information to Kelley on behalf of the Trenton facility.

E. Comparison of the Trenton and Laurens Facilities

As set forth more fully below, the record establishes that employees share the same wage and benefits package and work schedule structure. The employees also equally lack opportunity to transfer from one facility to the other. In contrast, the employees' training, job duties, and responsibilities differ between the two facilities.

1. Wage and Benefits

The Trenton and Laurens facility employees share the same wage and benefits structure. The starting hourly rate for employees is $8.50. Lead employees receive a starting hourly rate of

$9.50. The four labeled "supervisors" receive a starting hourly rate of $10.50. The benefits structure offers paid holiday, paid vacation, and medical and dental insurance. The Employer pays 75% of the premiums for insurance and offers a 401(k) with four percent matching. Each April and October, in the Employer's discretion, raises are given to employees based on their tenure with the company, work quality, and disciplinary record.

2. Uniforms

There is no mandatory uniform for employees at either the Trenton or Laurens facilities. However, the record shows some evidence that maintenance employees at the Trenton facility may have started wearing uniforms. No information was provided as to what this uniform consists of or when it may have been implemented. Although designed for maintenance employees, it is a voluntary uniform for Trenton employees. The Laurens facility does not have a maintenance department, so it is unclear on the record whether or not the Laurens facility employees have been offered the opportunity to wear a uniform.

3. Hiring, Transferring, and Training

The parties have stipulated that the four labeled "supervisors" listed above are not involved in the hiring of new employees for the Employer. Hiring has primarily been done at the Trenton facility by accepting walk-in applications. Only management officials at the Trenton facility participate in the review of those applications and the hiring of employees.

Employees who work at the Laurens facility typically do not transfer to the Trenton facility, and employees hired and working at the Trenton facility do not typically transfer to the Laurens facility. In fact, the record provides no evidence that a permanent, successful transfer has occurred from the Laurens facility to the Trenton facility, or vice versa. The record shows that some employees who are assigned to one facility have occasionally been asked to work at the other facility, but that this is not a normal, routine practice. Thus, such assignments of

employees occur only if the need arises, approximately three or four times a year. The only recent example of such an assignment has been the assignment of three or four employees from the Laurens facility to the Trenton facility to help patch a roof and do some construction on the walls of the facility.

When the Employer conducts training for employees, the training takes place separately for the Laurens and Trenton facilities, because of the 75-mile distance between them. Safety meetings are held on Tuesdays at the Trenton facility. These safety meetings include the Safety Manager Jay Alcorta, who travels from the Laurens facility. For the Laurens facility, because it is a smaller facility, Alcorta simply walks through the plant and speaks with employees about safety throughout the day. A full safety meeting, such as the one that occurs at the Trenton facility, takes place once a month at the Laurens facility.

4. Shifts

The production employees' work schedule for the Laurens and Trenton facilities consists of two 12-hour shifts per day. Employees in the production departments are broken up into three groups: A, B, and C. These groups work five consecutive days followed by four days off. The groups also rotate between day shifts and night shifts. For instance, if Group A works a five day shift schedule, the group returns to work after four days off and works five night shifts.

5. Employee Job Duties

The Trenton facility, which has the capability to do the recycling and manufacturing process from start to finish, has the following employee classifications: shipping and receiving employees, lab employees, maintenance employees, janitorial employees, and production employees. Production employees include extrusion employees, finishing employees, and recycling employees. The Laurens facility, on the other hand, has shipping and receiving

employees, janitorial employees, and recycling production employees. Thus, the Laurens facility does not have lab employees, maintenance employees, or production employees involved in extrusion and finishing.

Lead employees are responsible for a team of three to five employees. Leads are generally the most experienced person on the team and help to guide the newer employees concerning the operation of department. Lead employees work alongside other production workers on the line, but receive $1.00 more per hour for their added responsibility. Lead employees report directly to one of the four individuals who the Employer has labeled as "supervisors," namely Eduardo Sanchez, Jose Lal, David Martinez, and Adauco Torres (hereafter "contested supervisors"). Lead employees are also responsible for filling out the daily production reports setting forth performance factors for the team's machines. Once the production status reports are filled out with the appropriate output numbers from their team's machines, lead employees give the reports to the contested supervisors for approval.

F. Contested Supervisors' Responsibilities and Job Duties

The four contested supervisors are responsible for the leads and teams underneath them. Eduardo Sanchez and Jose Lal work under Production Manager Glenn Jang in the extrusion department of the Trenton facility, rotating between day shift and night shift. Lal and Sanchez spend approximately three to four months on one shift before switching from days to nights or vice versa. Sanchez and Lal are responsible for supervising nine lead employees and ultimately the approximately 50 employees underneath the leads. At any given time, Sanchez and Lal are each responsible for 25 employees.

David Martinez works under Production Manager Glenn Jang in the recycle department of the Trenton facility. It is unclear from the record what Martinez's daily work hours are.

Martinez has six lead men, one high lead man named Jose Ferrro, and approximately 20 employees underneath him.[4]

Adauco Torres works under Production & Quality Assurance Manager Kyong Kang in the finishing department of the Trenton facility. It is unclear from the record what Torres' daily work hours are. Torres has seven lead employees, one lead man named Edwin Vincente, and approximately 40 employees underneath him.[5]

Generally, each contested supervisor has the same responsibilities. The contested supervisor must observe his team of employees to make sure that the department is operating correctly. If any issues arise, such as a machine breakdown, the contested supervisor can assign employees to do other work and go to other areas to fill in. The contested supervisors do not have regular production jobs on the line; rather, they are asked to walk around the department to observe. For this reason, the contested supervisors do not have offices. Because the Employer's facility operates 24-hours per day, a contested supervisor must be present when a department manager is not at the facility. Unlike department managers, the contested supervisors are paid hourly and may earn overtime. Contested supervisors can be involved in calling employees in to work to cover absences and granting employee requests to go home due to illness.

Contested supervisors are also involved in creating work schedules for the employees assigned to them. The department manager will set the parameters for how many employees are needed for each shift. With this information, the contested supervisor chooses the employees who will work, as well as the work location in that department.

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[4] While noted on the record that Ferro is an "Acting Supervisor," the Employer did not contend that Ferro should be treated as a Section 2(11) supervisor and excluded from voting in election. Therefore, no such analysis of Ferro is contained in this decision.

[5] The record lacks any detail or description of Vicente. The Employer did not contend that Vicente should be treated as a Section 2(11) supervisor and excluded from voting in election. Therefore, no such analysis of Vicente is contained in this decision.

Finally, contested supervisors are somewhat involved in reviewing lead employee status reports, providing general input for raises, and drafting warnings to employees. Each day, lead employees fill out production status reports that are submitted to the contested supervisor for review. The contested supervisor is asked to review these reports for visible errors, and pass the reports to the department manager for review and approval. If the Employer chooses to offer raises to employees, usually in April and October of each year, contested supervisors can provide limited input for raises. The contested supervisor uses a list to indicate which employees should receive a raise, and then submits that list to the department manager.[6] Also, if the contested supervisors notice any employee issues during the day that warrant discipline, they have been told that they may issue written warnings to the employee, though the record contains no evidence of them actually exercising this authority on their own initiative. If the contested supervisor fails to issue warnings that are apparent to the manager, the contested supervisor may be directed to issue the written warning.

UNIT SCOPE ANALYSIS

A. Applicable Case Law

The Employer contends that the bargaining unit should include employees from the Trenton facility, as well as employees from the Laurens facility. A single-facility unit is presumptively appropriate for collective bargaining. See *J&L Plate, Inc.*, 310 NLRB 429, 429 (1993) Overcoming this presumption requires a finding that the single facility has been effectively merged into a more comprehensive unit, or so functionally integrated with another unit that it has lost its separate identity. *R &D Trucking*, 327 NLRB 531 (1999). Moreover, a single facility can include more than a single building. *Child's Hospital,* 307 NLRB 90 (1992). Finally, the burden here is "'on the employer to overcome the presumption and demonstrate that

[6] The department manager makes his own suggestions for raises and submits that input to Vice President of Operations Ted Oh, who is ultimately responsible for approving all employee raises.

a single facility is inappropriate.'" *Marine Spill Response Corporation*, 348 NLRB 1282, 1285 (2006), quoting *Dattco, Inc.*, 338 NLRB 49 (2002). This burden is a substantial one, as noted by the Board in *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 11, holding that "the proponent of the larger unit must demonstrate that the employees in the more encompassing unit share 'an overwhelming community of interest' such that there 'is no legitimate basis upon which to exclude employees from it,'" quoting *Blue Man Vegas, LLC v. NLRB,* 529 F.23d 417, 421 (D.C.Cir. 2008).

In determining whether a single-facility unit is appropriate, the Board reviews the following factors: (1) central control over daily operations and labor relations, including the extent of local autonomy, (2) similarity of skills, functions, and working conditions, (3) degree of employee interchange, (4) distance between the locations, and (5) any previous bargaining history. *New Britain Transportation Co.,* 330 NLRB 397 (1999)

B. Application of the Case Law to Unit Scope

The record shows that the Employer has not satisfied its burden to rebut the single-facility presumption, and, therefore, the Trenton facility constitutes an appropriate bargaining unit. In this regard, the Laurens and Trenton facilities lack sufficient centralized control, are somewhat dissimilar in employee skills and functions, and lack employee interchange based on the distance between the facilities. Finally, the record indicates that there has been no previous bargaining history at either facility.

1. Centralized Control

Although the Trenton and Laurens facility share centralized control at the top of the Employer's management hierarchy, the bulk of day-to-day labor relations is handled locally. A review of the Employer's organizational chart shows that the vast majority of the Employer's management representatives are assigned to the Trenton facility. There are only three

individuals who are responsible for activities at both facilities. Of these, Vice President Ted Oh testified that he is responsible for both locations and oversees both operations. However, Oh's office is located at the Trenton facility and Oh has not been to the Laurens facility since late 2012. Jay Alcorta holds the position of safety manager at the Trenton facility and plant manager of the Laurens facility. Alcorta's office is located at the Laurens facility, but he travels to the Trenton facility once a week to conduct safety meetings for employees. Finally, Assistant Controller Susan Kelley is responsible for payroll at both locations. Kelley's office is located at the Laurens facility, and she receives all relevant information on wages and hours worked from an assistant at the Trenton facility.

Apart from these three named individuals, direct day-to-day management responsibilities are vested in personnel at each location. "Common to those cases in which a single-facility or a multi-facility unit smaller than the unit requested by the Employer was found appropriate, are local autonomy of labor relations in the smaller unit, including the ability of local supervisors to schedule work [and] grant time off." *Marine Spill Response Corporation*, 348 NLRB at 1286. In that regard, Director of Manufacturing Kevin Corey operates the Trenton facility and Jay Alcorta, acting as plant manager, operates the Laurens facility. Corey visits the Laurens facility approximately once or twice a year to fill in for Oh when he is unavailable. The Employer has provided no evidence showing that the Laurens facility depends on the Trenton facility, or its management structure, to grant time off, develop work schedules, and the like. In fact, although there is some evidence of centralized control over operations, in the sense that Oh is technically in charge of both facilities, the bulk of the day-to-day operations is managed by each of the facilities' respective managers. Even if this limited central control were enough to establish this factor, it would not be sufficient to rebut the single-facility presumption alone. See, e.g., *Carter Hawley Hale Stores,* 273 NLRB 621, 623 (1984); cited by *New Britain Transportation Co.,* 330

NLRB 397 (1999) (despite centralized administration of the Employer's beauty salons, single store units were found to be appropriate).

2. Similarity of Skills, Functions, and Working Conditions

Although the Laurens and Trenton facilities share a degree of similarity with regard to employee positions, the overall operation of the Trenton facility requires a wider range of employee functions and skills. Both the Laurens facility and Trenton facility have shipping and receiving employees, janitorial employees, and recycling production employees. These individuals, regardless of location, perform similar functions that require the same skills. However, the Trenton facility has additional classifications of employees that are not found at the Laurens locations. These classifications include lab employees, maintenance employees, and extrusion and finishing production employees. The lab and additional production employees are involved in the production and manufacture of the Employer's final product, which the Laurens facility does not have the capability to do. In addition, maintenance employees are housed solely in the Trenton facility, with no counterparts at the Laurens facility. Facilities that differ with respect to the types of employee positions that are available support the presumption that a single-facility unit is appropriate. See *D&L Transp., Inc.,* 324 NLRB 160, 161 (1997)

The record contains scant evidence regarding working conditions in the facilities themselves. Alcorta, who is the only manager who makes regular trips to both the Trenton and Laurens facilities, testified that he has more interaction with the employees at the Laurens facility, because it is a smaller plant. However, the record is devoid of sufficient evidence to make this element determinative.

3. Employee Interchange

The record shows that employee interchange is virtually non-existent. The presumption of a single-facility unit has not been rebutted when the Employer's interchange data is

represented in aggregate form rather than as a percentage of total employees. *Dunbar Armored, Inc. v. NLRB,* 186 F.3d. 844, 849 n. 5 (7th Cir. 1999), enforcing *Dunbar Armored, Inc.*, 326 NLRB No. 139 (1998). Oh testified that "three, four times a year" employees are asked to go from one facility to another. He further testified, as did other witnesses, that recently some production employees had been sent from Laurens to Trenton to patch the facility's roof, approximately two or three times a year. Alcorta testified that these three or four employees participated in maintenance work a few times a year, traveling to Trenton from Lauren. Alcorta stated that these employees stayed for approximately two or three days, and further testified that these individuals were managed by the Maintenance Manager Joey Walker. Finally, Oh testified that some maintenance employees, Kevin and Adam Vorhees, have traveled between facilities to do some additional maintenance work for the Employer, but could not identify when this occurred or for how long. Oh testified that allowing employees to fill in for absent employees from one facility to another was "not normally" done.

Training for employees occurs separately for each facility. Trenton facility employees have a weekly safety meeting at their facility, whereas Laurens employees receive informal safety training throughout the day from Alcorta in conjunction with his regular supervisory duties. Formal safety meetings occur monthly at Laurens. Oh testified that Trenton facility employees and Laurens facility employees do not train together because of the expense involved in travel and the distance between facilities.

In addition to the lack of specific evidence presented by the Employer regarding the total number employees subject to interchange between the facilities, I find that the low number of temporary transfers and no known permanent transfers, coupled with the apparent infrequency of such transfers, is insufficient to rebut the single-facility presumption. *New Britain Transportation Co.,* 330 NLRB 397, 398 (1999)

4. Distance Between the Two Locations

The 75-mile distance between the two facilities, especially given the lack of employee interchange, strengthens the presumption that a single-facility unit is appropriate. The Board would consider this distance, in conjunction with other factors that support the single-facility presumption, to be significant. *New Britain Transportation Co.,* 330 NLRB 397, 398 (1999)

C. Conclusion of Unit Scope Analysis

Based upon the foregoing, I find that the Employer has not rebutted the single-facility presumption. Therefore, the petitioned-for unit of Trenton facility employees, excluding the employees at the Laurens facility, is an appropriate bargaining unit.

The 2(11) SUPERVISOR ANALYSIS

A. Applicable Case Law

The Employer contends that the contested supervisors should be excluded from the unit because they are supervisors within the meaning of Section 2(11) of the Act. The traditional test for determining supervisory status is: (1) whether the individual has the authority to engage in or effectively recommend any one of the twelve criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the individual holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994). The burden of proving supervisory status lies with the party asserting that such status exists. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2001). Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc., Id.* at 694. Finally, lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1048 (2003).

In regard to the first prong of the supervisory test, that is, whether the individual possesses the authority to perform one of the primary indicia, it is necessary to establish the

presence of at least one of the primary indicia before secondary indicia, such as employee/supervisor ratios, for example, may be considered. *Pacific Beach Corp.,* 344 NLRB 1160, 1161 (2005). In regard to the second prong, regarding the use of independent judgment, it is within the Board's discretion to determine, within reason, what scope or degree of independent judgment meets the statutory threshold. *NLRB v. Kentucky River Community Care,* 121 S.Ct. 1861 (2001). In this regard, mere inferences or conclusory statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.,* 348 NLRB 1056, 1057 (2006).

B. Application of the Case Law Concerning Primary Indicia and Use of Independent Judgment

The record shows that the Employer has not met its burden to establish that the contested supervisors have the authority to engage in any of the 12 primary indicia listed in Section 2(11), or that they exercise independent judgment in the interest of the Employer in regard to any of the primary indicia. Thus, neither the first or second prong of the supervisory test is satisfied. Although there is evidence here of some secondary indicia, including some imbalance in supervisory/employee ratio, differences in pay, and the use of the title "supervisor," it is settled that supervisory status cannot be obtained through secondary indicia alone. *Williamette Indus.,* 336 NLRB 743 (2001). Thus, as the Employer has not met its burden of establishing any primary indicia, the presence of secondary indicia is not dispositive.

In regard to the specific 2(11) indicia, the parties stipulated that the contested supervisors do not have the authority to hire employees. Further, the record is devoid of evidence establishing that contested supervisors can, in their own independent judgment, hire, transfer, lay

off, recall, promote, or adjust grievances for other employees. Set forth below, therefore, is my analysis of these indicia on which there is some record evidence.

1. Discipline, Suspension or Discharge

Although there is some evidence that the four contested supervisors have been told to write up employees who do not meet safety and work requirements, the record does not contain sufficient evidence to satisfy the Employer's burden in establishing the presence of this indicium. That is, there are six written warnings in evidence. Of those, three warnings were specifically directed by Production Manager Jang. On the remaining three, the record contains no evidence concerning the circumstances giving rise to the warnings, so it is unknown whether the contested supervisor initiated and issued those warnings. Moreover, there is no evidence to establish that a contested supervisor exercised independent judgment in regard to these warnings. Further, there is no evidence that any of these warnings resulted in a loss of pay or other adverse consequence. See *Bredero Shaw*, 345 NLRB 782, 783 (2005), citing *Azusa Ranch Market*, 321 NLRB 811 (1996) (Board declined to find supervisory status based on the issuance of discipline that did not result in a loss of pay).

The record establishes that contested supervisors are provided with blank "Employee Warning Notice Forms" to fill out in case an infraction occurs, and that accumulated written warnings could result in termination of employment for the employee. However, generalized testimony is insufficient to establish supervisory status. *G4S Regulated Security Solutions,* 358 NLRB No. 160 (2012). If no "single specific instance in which [the supervisor] had used discretion or independent judgment regarding discipline" can be found, then supervisory status cannot be established with regard to that primary indicia. *Id.,* 358 NLRB No. 160.

In regard to the asserted use of independent judgment, one contested supervisor, Jose Lal, testified that he had been directed by Production Manager Glenn Jang to write up "every person

that would not satisfy the safety requirements or work requirements." However when Lal failed to fill out the written warnings for each employee's safety violations, Jang again directed Lal to do so. This oversight belies any assertion that the contested supervisors have exercised independent judgment in regard to issuing discipline. Moreover, as set out above, the Employer has provided no evidence establishing that a contested supervisor has actually initiated the disciplinary process. Compare *Progressive Transportation Services,* 340 NLRB 1044 (2003) (lack of supervisory authority to discipline was found when the alleged supervisor only initiated one of thirty three warnings, with the single initiated warning having been rescinded by a manager). Therefore, the Employer has failed to meet its burden of showing supervisory status with regard to issuing discipline, and a ruling against the Employer on this indicium is appropriate. See *Dean & Deluca New York, Inc.,* 338 NLRB at 1048.

With regard to the contested supervisors' involvement in suspension and discharge, the Employer has also failed to meet its burden. Production Manager Jang testified that contested supervisors are involved in the suspension of employees. Jang testified that suspensions are rare, but that if he is not in the facility, the contested supervisors have the authority to suspend. Jang gave two examples of suspensions that had occurred in the last year, but could not state definitively which contested supervisor, Sanchez or Lal, was involved. In fact, Jang's testimony did not indicate the circumstances surrounding the suspension, the reason for the suspension, or provide any further evidence regarding those suspensions. Contested supervisor Lal testified later that contested supervisors are not involved in suspensions and that he does not have authority to unilaterally suspend an employee. Moreover, Lal also testified that Jang is responsible for suspensions, and that Jang can decide whether or not to suspend someone. No specific evidence was produced by the Employer on the contested supervisors' authority to discharge an employee. Again, a lack of evidence must be construed against the party asserting

supervisory status; here the Employer. *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1048 (2003).

2. Assignment of Work

Authority to assign work refers to the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving an employee significant overall duties or tasks." See *Oakwood Healthcare, Inc.,* 348 NLRB 686, 689 (2001). Such action is not independent "if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Id.,* 348 NLRB 686, 693.

The testimony on record suggests that contested supervisors participate in three types of scheduling "assignments": initial work schedule drafting, machine break-down scheduling, and approving of overtime or sick leave. With regard to initial work schedule drafting and machine break-down scheduling, the evidence tends to show that such action is dictated by verbal company policies and does not require independent judgment. Contested supervisor Lal testified that he and contested supervisor Eduardo Sanchez draft the work schedule together. Lal and Sanchez determine which employees will be grouped together, based solely on their ability to operate the machines and with a goal of having one experienced employee, or a lead, in each group. Any substantive changes in the production schedule are made by Director of Manufacturing Kevin Corey and passed down through managers to the contested supervisors. Moreover, the number of employees needed to work on a particular shift is determined by the department managers.

Routine assignment decisions based solely on basic experience and seniority are insufficient to confer supervisory status. See *Alternate Concepts, Inc.,* 358 NLRB No. 38, sl. op.

6 (2012). Lal testified that machine break downs take up two to three hours of his 12-hour day, suggesting that this is a regular occurrence. Testimony from Vice President of Operations Ted Oh confirms that the "rule of thumb" for these situations is that employees are instructed to clean the area first, followed by instructions to find other stations on which to help out. These restrictive verbal policies for machine break-downs reduce the independent judgment of the contested supervisors to such an extent that supervisory status cannot be obtained through this indicium. See *Oakwood Healthcare, Inc.,* 348 NLRB 686, 693 (2001)

Further, the Employer has failed to provide enough evidence of the contested supervisors' authority to assign and authorize overtime. Vice President Oh and Production Manager Jang testified that contested supervisors have the authority to grant overtime to employees based on need at the facility. An employee, Walter Tillman, testified that contested supervisor David Martinez has granted him overtime on several occasions upon his request. However, the Employer did not present Martinez as a witness in order to corroborate Tillman's testimony. The only contested supervisor who testified, Jose Lal, stated that all instances of overtime initially pass through Jang. In fact, Lal testified that Jang has rejected his choice for an employee replacement in the past because the employee would receive overtime. Similarly, while Oh, Jang, and Lal testified consistently that contested supervisors have the authority to approve an employee's request to leave work for an emergency or illness, no evidence was provided to show specific examples of the exercise of this authority under these circumstances or that such a decision even required independent judgment. A lack of independent judgment in granting overtime, coupled with the lack of evidence on this indicium, requires a finding that the Employer has not satisfied its burden. Compare *Illinois Veterans Hospital Home at Anna L.P.,* 323 NLRB 890, 892 (1997) (where supervisory status was not found when volunteers are solicited for overtime and no authority to require overtime existed).

3. Responsible Direction

The Employer also contends that the contested supervisors responsibly direct work, citing *Croft Metals, Inc.*, 348 NLRB 717 (2007). The Employer, on brief, however, does not address whether the contested supervisors do so with independent judgment. I find that neither element is satisfied on the record evidence.

In regard to responsible direction, it is clear that, within set parameters, the contested supervisors oversee the production on the plant floor and monitor production and efficiency. As noted above, they prepare work schedules. The contested supervisors also review production status reports for teams of employees, and the Employer contends that they are held accountable for poor production, thereby demonstrating that their direction of work is "responsible."

Contrary to the Employer's argument, however, the cited record evidence on this issue is ambiguous, and appears speculative. That is, the extrusion and recycling manager responded, in answer to the question, "If certain production is not satisfied, are [the contested supervisors] penalized?" by stating, "They will receive warnings if it hasn't happened before. They are to make a report about the amount. They have to explain." No documentary proof was adduced by the Employer on this issue, and no instances of discipline were proffered. I find, therefore, that the record is insufficient to establish that the contested supervisors are held accountable by the issuance of discipline to them.

Moreover, even assuming that responsible direction is demonstrated, the record does not establish that the contested supervisors use independent judgment in their direction of work. Notably, the Board in *Croft Metals* found that, although the leads in that case, who had actually received discipline for poor production and did responsibly direct work, they did not exercise independent judgment in doing so, and, therefore, were not statutory supervisors. *Croft Metals*, 348 NLRB at 722. The Board noted that "proffered examples of instructions given to employees

by load supervisors consisted of matters such as 'where to put it and how to put it,'" and noted further that the production employees generally "perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance." *Id.* The Board's rationale in *Croft* obtains on the facts of this case.

Further, the oversight of the contested supervisors in regard to the production reports similarly does not support a finding of independent judgment. Vice President Oh testified that these reports, while important to the Employer because they track quality of production, do not require much discretion. The preparer of the report, usually the lead, simply reads the machine meter and fill out the report. Vice President Oh testified that the contested supervisor would conduct an investigation if, in his review, the report had errors in it, but Oh did not describe the scope of this investigation, or provide any specifics. In fact, no evidence was presented on the depth and level of independent judgment required in these investigations. Further, the Employer did not provide evidence that such an independent investigation by the contested supervisor had ever, in fact taken place. Finally, contested supervisor Jose Lal testified that he signs the form, and that Manager Jang later reviews the report himself. A routine and clerical task that requires no independent judgment will not trigger supervisory status. *G4S Regulated Security Solutions,* 358 NLRB No. 160 (2012).

Finally, the record does not establish that during the night shift, when managers Jang and Kang are not physically present at the facility, the contested supervisors exercise independent judgment in their oversight of the production process. Rather, it appears that the managers give the contested supervisors sheets that contain instructions, telling them "what to do" during the night shift.

4. Authority to Recommend Raises or Reward

An individual's recommendation to reward employees, including a recommendation of raises or bonuses, can suggest supervisory status, depending on the effectiveness of the recommendation. *Harvey's Resort Hotel,* 271 NLRB 306, 311 (1984). If, however, the alleged supervisor's superiors "conducts their own independent investigation rather than relying on the word of that individual, it can hardly be said that the recommendation is effective." *Id* 271 NLRB at 311. On this record, the Employer provided two sheets, marked as Employer Exhibit 4 and dated April 1, 2013, that purport to be recommendations of raises for employees. Testimony from contested supervisor Jose Lal confirms that similar documents are drafted by him and Eduardo Sanchez. However, Lal denies having filled out the documents labeled in Exhibit 4. Contested supervisor Eduardo Sanchez was not presented to testify about these documents. However, notwithstanding the lack of evidence, Production Manager Jang testified that he would "of course" make changes to the document after contested supervisors made their recommendation for raises and that Ted Oh had the final decision. Jang testified that management agreed with 90% of the previous year's contested supervisors' recommendations and that the other 10% were disputed because Jang had a different opinion, such as Jang's review of absences, for example.[7] No evidence was produced by the Employer of the previous year's recommendations for raises, which raises were effectuated, and the reasons for denying those recommendations. On the basis of Jang's testimony, it is unlikely that the contested supervisor's recommendations are effective in determining the raises of employees. More significant, as the record does not provide enough evidence to make a sound determination of effectiveness, that

[7] Jang also testified that he was unfamiliar with the "I" markings on the written recommendations in Exhibit 4, and assumed that they stood for a "1."

lack is properly construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.,* 338 NLRB at 1048.

5. Authority to Transfer, Layoff, Recall, Promote, or Adjust Grievances

As noted above, a review of the record shows no evidence that the contested supervisors have the authority to transfer employees, lay off or recall employees, promote employees, or adjust grievances for employees. Testimony from Jang shows that contested supervisors are not involved in transfers. Jang testified that he did not know if contested supervisors were involved in layoffs or recalls. There is no testimony that establishes the contested supervisors' authority to promote or adjust grievances.[8] As noted above, when evidence is insufficient to adequately determine supervisory status, the evidence is construed against the party asserting supervisory status; in this case, the Employer. *Dean & Deluca New York, Inc.,* 338 NLRB at 1048.

C. Conclusion of Supervisory Status

Based upon the foregoing, I find that there is insufficient evidence to conclude that the four named individuals, Eduardo Sanchez, Jose Lal, David Martinez, and Adauco Torres, are statutory supervisors under Section 2(11) of the Act. As a result, I shall include these four individuals in the unit found appropriate herein.[9]

CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at hearing are free from prejudicial error and are hereby affirmed.

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[8] Jang simply testified, when asked about adjusting grievances, that contested supervisors can provide employees with ice when "it's too hot" or "if they need to have more gloves."

9 Production Supervisors Bobby Rice and Marcos Cabrera were not considered for supervisory status because (1) it was not alleged by the Employer that these individuals should be excluded from the bargaining unit and (2) it was determined that Laurens facility employees would not be included in the bargaining unit, thereby excluding Rice and Cabrera regardless of their supervisory status.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction here.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees, employed by the Employer at its Trenton, South Carolina facility, excluding all other employees, including office clerical employees, professional and confidential employees, and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees in this unit will vote on whether or not they wish to be represented for purposes of collective bargaining by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898. The date, time, and place of the election will be specified in the Notice of Election that the Subregional Office in Winston-Salem, North Carolina, will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees

engaged in any economic strike, who have retained their status as strikers and who have been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company,* 394 U.S. 759 (1969).

Accordingly, it is hereby directed that on **May 10, 2013**, the Employer must submit to the Subregional Office in Winston-Salem, North Carolina, an election eligibility list, containing the full names and addresses of all the eligible voters in the unit. *North Macon Health Care Facility,* 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Winston-Salem Subregional Office located at Republic Square, Suite 200, 4035 University Parkway, Winston-Salem, North Carolina, 27106-3325. No extension of time to file the list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file the list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (336) 631-5210. Because the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Subregional Office located at Republic Square, 4035 University Parkway, Winston-Salem, North Carolina, 27106-3325. To file the eligibility list electronically, go to the Agency's website at www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services,* 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 14th Street, N.W., Washington D.C. 20570-0001. This request must be received by the Board in Washington by May 17, 2013. The request may be filed electronically through the Agency's website, www.nlrb.gov,[10] but may not be filed by facsimile.

Dated at Winston-Salem, North Carolina, on this 3rd day of May 2013.

/s/ Mary L. Bulls

Mary L. Bulls, Acting Regional Director
Region 10, Subregion 11
National Labor Relations Board
4035 University Parkway, Suite 200
Winston-Salem, NC 27106

[10] To file the request for review electronically, go to www.nlrb.gov, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Case 10-RC-101166

Petitioner

AFFIDAVIT OF SERVICE OF: Decision and Direction of Election, dated May 3, 2013.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on May 3, 2013123, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

JAMES E. SANDERSON JR., PRESIDENT-USW LOCAL 7898 UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898 PO BOX 777 GEORGETOWN, SC 29442-0777	NORMAN J. SLAWSKY , ESQ. QUINN CONNOR LLP 3516 COVINGTON HWY DECATUR, GA 30032-1850
DIONISIO GONZALEZ , ORGANIZER UNITED STEELWORKERS INTERNATIONAL UNION 111 PLAZA DR HARRISBURG, NC 28075-8441	MARIANA PADIAS , ASSISTANT GENERAL COUNSEL UNITED STEEL WORKERS 5 GATEWAY CTR STE 807 PITTSBURGH, PA 15222-3608
TED OH , VP OPERATIONS & PLANT MANAGER US FIBERS 30 PINE HOUSE RD TRENTON, SC 29847-2010	UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION 5 GATEWAY CENTER 60 BLVD OF THE ALLIES - STE 807 PITTSBURGH, PA 15222
JONATHAN P. PEARSON , ESQ. FISHER & PHILLIPS LLP P.O. BOX 11612 COLUMBIA, SC 29211-1612	

May 3, 2013		Lisa A. Davis, Designated Agent of NLRB
Date		Name
		/s/ Lisa A. Davis
		Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

EMPLOYER'S REQUEST FOR REVIEW

Jonathan P. Pearson, Esquire
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jpearson@laborlawyes.com

Attorney for Employer

May 16, 2013

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I. INTRODUCTION

The Employer, Pac Tell Group, Inc., d/b/a US Fibers is engaged in the business of reprocessing waste and producing synthetic fiber in Trenton, South Carolina. On March 26, 2013, the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 (US) petitioned to represent a unit of all production and maintenance employees at the Trenton facility. A hearing was held in Aiken, SC on April 18, 2013, to determine whether a question concerning representation existed. Following the hearing, US Fibers argued that the Employer's Laurens, South Carolina, facility should be included with the Trenton facility in the proposed bargaining unit. The Employer also argued that four individuals, Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres were supervisors ("putative supervisors") as defined by Section 2(11) of the Act.

On May 3, 2013, Acting Regional Director Mary Bulls ("ARD") issued a Decision and Direction of Election ("Decision") finding that the individuals named above were not supervisors under the Act and concluded that the following unit was appropriate for collective bargaining:

> A unit of all full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance workers employed by the Employer at its Trenton, South Carolina, facility, excluding all other employees, including office clerical employees, professional and confidential employees, and guards and supervisors defined under the Act.[1]

Pursuant to Section 102.67(b) of the Board's Rules and Regulations, US Fibers files this request for review of the ARD's decision that the putative supervisors are not supervisors under the Act. The Board should grant the request for review because: (1) substantial questions of law and policy are raised because of departure from officially reported Board precedents in the

[1] The Employer does not request review of the ARD's decision not to include Laurens in the proposed unit.

Decision; and (2) the ARD's decisions on certain substantive factual issues are clearly erroneous on the record, and such issues prejudicially affect the rights of the Employer.

II. FACTUAL BACKGROUND

A. US Fibers' Operation

Pac Tell Group, Inc., owns and operates a synthetic fiber manufacturing operation under the name of US Fibers at 30 Pine House Road in Trenton, South Carolina. (Tr. 14-15). The Trenton plant has approximately 500,000 square feet in four buildings. (Tr. 112). Ted Oh is Vice President of Operations of US Fibers. He testified at length regarding the South Carolina facilities and its operations and presented an organizational chart. (Emp. Exh. 1). Eduardo Sanchez, Jose Lal, and David Martinez are supervisors working under Production Manager Glen Jang. (Tr. 28-30; Emp. Exh. 1). Aduaco Torres works as a Finishing Supervisor under Production Manager Kyong Kang. (Id.). Each of these employees has Lead Operators working under them. (Tr. 35; Emp. Exh. 1).

B. US Fibers' Supervisors

Sanchez, Lal, Martinez, and Torres were officially promoted to supervisor in October of 2012 in a meeting held with all Trenton employees. (Tr. 171-172). The meeting was conducted by Alcorta, who told the assembled employees that Sanchez, Lal, Martinez, and Torres were going to be supervisors and would run the shifts. (Id.). Oh and Alcorta had met earlier with the four men individually, explained to them their change in status, and asked them if they would be willing to become supervisors. (Tr. 82, 171-172).

Alcorta testified as follows:

> Q: You said he explained the expectations. What were his expectations?

A: Preparing work schedules, preparing the production schedules, all the different stats that we would have on our shift, look for people to make sure we had a full shift, apply overtime when it was necessary, recommend discipline, and different things like that.

Q: Now we keep referring to the four individuals. Can you tell me who they were?

A: Yeah, we have David Martinez, Aduaco Torres, we have Jose Lal, and we have Eduardo Sanchez.

(Tr. 172).

Sanchez and Lal report to Jang and supervise employees in the Extrusion operation. (Tr. 28-30; Emp. Exh. 1). Martinez also reports to Jang and supervises employees in the Recycle operation, which processes raw materials for production. (Id.). Torres is a Finishing Supervisor who reports to Kang. (Id.). He supervises employees involved in the stretching, crimping, setting, cutting, and bailing operations. (Id.).

Sanchez has nine Lead Operators working under him. Each lead supervises two people for a total of about 25 employees under his supervision. (Tr. 34). Lal supervises six lead persons, each of whom supervises three employees for a total of about 25. Martinez supervises 22 employees. (Id.). Torres supervises approximately 40 hourly employees, including eight lead people. (Tr. 34; Emp. Exh. 1). The leads are "basically . . . more experienced operators, that . . . have operational responsibility as far as making sure everything is right and they are more skilled than the rest of the team . . . ." (Tr. 35).

The Regional Director correctly found as follows:

> Generally, each contested supervisor has the same responsibilities. The contested supervisor must observe his team of employees to make sure that the department is operating correctly. If any issues arise, such as a machine breakdown, the contested supervisor can assign employees to do other work and go to other areas to fill in. The contested supervisors do not have regular production jobs on

> the line; rather, they are asked to walk around the department to observe. For this reason, the contested supervisors do not have offices. Because the Employer's facility operates 24-hours per day, a contested supervisor must be present when a department manager is not at the facility. Unlike department managers, the contested supervisors are paid hourly and may earn overtime. Contested supervisors can be involved in calling employees in to work to cover absences and granting employee requests to go home due to illness.
>
> Contested supervisors are also involved in creating work schedules for the employees assigned to them. The department manager will set the parameters for how many employees are needed for each shift. With this information, the contested supervisor chooses the employees who will work, as well as the work location in that department.

(Decision, p. 9). Facts surrounding the specific duties of the putative supervisors, as they relate to 2(11) status, are discussed in more detail below.

III. ARGUMENT

A. The Relevant Standard For Analysis of Supervisory Status Under Section 2(11) of the Act

Section 2(11) of the Act defines "supervisor" as:

> any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the United States Supreme Court adopted a three-part test for determining whether an individual is a "supervisor" under Section 2(11). Under the Supreme Court's test:

> Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions; (2) their

> exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.

Kentucky River, 532 U.S. at 713. The burden of proving that an individual is a supervisor rests on the party alleging that supervisory status exists. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *Kentucky River*).

The first prong of the Supreme Court's test considers whether the putative supervisor holds the authority to engage in any one of the twelve supervisory functions listed in Section 2(11). *Kentucky River*, 532 U.S. at 713. "If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment." *Oakwood Healthcare, Inc.*, 348 NLRB at 688.

The second prong of the test considers whether the putative supervisor's authority requires the use of independent judgment and is not of a merely routine or clerical nature. *Kentucky River*, 532 U.S. at 713. To satisfy the "independent judgment" prong of the Supreme Court's test, "an individual must, at a minimum, act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data" provided that the act is "not of a merely routine or clerical nature." *Oakwood Healthcare, Inc.*, 348 NLRB at 693.

B. The ARD's Factual Determination Regarding Whether Putative Supervisors Possess Authority to Effectively Recommend Discipline Is Clearly Erroneous and Prejudicial

The record clearly established that Sanchez, Lal, Martinez, and Torres have the authority to discipline employees. The ARD misconstrued the evidence of record by holding that there

was only "generalized" testimony of authority to discipline employees, which was insufficient to establish supervisory status. The ARD cited *G4S Regulated Security Solutions*, 358 NLRB No. 160, slip op. (2012), for the proposition that "generalized testimony is insufficient to establish supervisory status." (Decision, p. 17). In *G4S*, the Employer relied exclusively on the testimony of a senior manager "several levels removed" from the supervisors in question. Id. at 2. The senior manager made "conclusory assertions" that supervisors had authority to discipline. Id.

In the present case, witnesses for both the Employer and the Petitioner agreed that the putative supervisors were specifically instructed to issue discipline. A Union witness, putative supervisor Jose Lal, and an Employer witness, Production Manager Glen Jang, both testified that Jang had given Lal and other supervisors disciplinary action forms and instructed them to administer discipline to employees who violated the rule. Jang testified that approximately three or four months before the hearing he instructed his supervisors to discipline employees under appropriate circumstances. (Tr. 135-136, 139).

Jang stated:

> A: At the beginning I told them to – warning. In other words, I delegate the responsibility to them.
>
> Q: And what does he mean by the beginning?
>
> A: Three or four months ago.
>
> Q: What did he tell them three or four months ago regarding issuing disciplinary warnings?
>
> A: You write – you manage people, you can do warnings.

(Tr. 139, Lines 8-14).

Lal confirmed this in his testimony. He stated that Jang "gave us these forms blank and told us that every person that would not satisfy the safety requirements or work requirements,

that we would have to fill one of these forms out." (Tr. 211, Lines 9-12). While he stated that Jang instructed him to issue two of the warnings contained in Exhibit 2, he admitted that it was he who decided whether to issue a first warning, second warning, or final warning. (Tr. 212). He also admitted that he decided what offense had been violated. (Id.). Lal testified further:

> Q: Did you testify earlier that Mr. Jang gave you a stack or group of blank forms?
>
> A: Yes.
>
> Q: Did he tell you to fill these forms out when you saw an employee violating the rules?
>
> A: [Yes].
>
> Q: Did he tell you it was your responsibility to fill out a form when you saw someone violate the rule?
>
> A. Yes.

(Tr. 223-224, Lines 20-23). The ARD completely ignored the fact that Lal agreed with and corroborated Jang's testimony.

C. The ARD's Decision That Warnings Are Not "Discipline" Departs From Officially Reported Board Policy Precedent

The ARD made an error of law when she held that warnings are not considered "discipline" for 2(11) purposes if they do not result in the loss of pay or other adverse consequences. The Board has consistently found that written warnings and counselings are discipline for Section 2(11) purposes. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007) ("[I]t is clear that the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee."); *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062, 1064 (2006)

("[W]riteups . . . are placed in the employees' personnel file and play a significant role in the disciplinary process."); *Wilshire at Lakewood*, 345 NLRB 1050 (2005) (same).

In *Oak Park*, 351 NLRB 27, the Board made it clear that an individual's authority to issue written warnings – thereby initiating the progressive disciplinary process against an employee – satisfies the "independent judgment" prong of the statutory supervisor test. The Board held, "it is clear that the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee." Id.

Similarly, in *Bon Harbor*, 348 NLRB at 1064, the Board found that LPN's exercised independent judgment in disciplining employees notwithstanding that "management retain[ed] the ultimate authority to review the disciplinary action and to override it . . . ." The LPN's initial discretion whether to issue a write-up or not persuaded the Board: "[T]he evidence shows that LPN's are vested with the authority to decide whether to write-up employees for rule infractions." Id. at 1064. See also *Sheraton Universal Hotel*, 350 NLRB 1114 (2007) (finding that although upper management reviewed disciplinary warnings, they typically just signed off on them, indicating that the putative supervisors exercised independent judgment in disciplining employees). *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003) (individual found to be supervisor where disciplinary issues are brought to operations manager, who does not conduct an independent investigation but merely decides the level of discipline to be imposed); *Westwood Health Care Center*, 330 NLRB 935 (2000) (individuals found to be supervisors where they had authority to issue oral and written warnings and to suspend employees, and individuals' supervisor never independently investigated a suspension or recommendation of termination).

D. The ARD's Finding That a Putative Supervisor Must Actually Issue Discipline, As Opposed to Having Authority to Do So, In Order to Be Considered a 2(11) Supervisor Departs From Officially Reported Board Precedent

The ARD's decision that the putative supervisors were not 2(11) supervisors was based largely on her finding that no actual disciplinary action had been issued by the four supervisors in question. This is not surprising, since the supervisors were only elevated to supervisory status several months prior to the hearing. (Tr. 171-172).

It is crystal clear that it is the *authority* to discipline and not the actual exercise of discipline which is important for purposes of 2(11) analysis. See *Pepsi-Cola Company*, 327 NLRB 1062, 1064 (1999) ("Contrary to the Regional Director, we do not draw a distinction between those account representatives who in fact have exercised their authority to discharge and those who have not; the determinative factor is that all such account representatives possess the authority to do so."); see also *Station Casinos LLC*, 358 NLRB No. 77, slip op. at 8 (2012) ("Section 2(11) requires only the possession of authority to carry out the operation of an enumerated supervisory function, not its actual exercise.") (quoting *Barstow Community Hospital*, 352 NLRB 1052, 1053 (2008)); *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) ("Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise.").

Once again, the ARD misconstrued *G4S*. In that case, the Board noted that there were no disciplinary warnings issued by the two putative supervisors. However, in *G4S*, there was no specific corroborating testimony regarding whether the putative supervisors had been given authority to issue discipline. Further, the putative supervisor in *G4S* denied having authority to discipline employees. In this case, a putative supervisor and union witness Lal admitted that he

had been given disciplinary warning notices by his Department Manager and told that his job duties included issuing disciplinary warnings in appropriate circumstances.

As explained above, US Fibers' supervisors have authority to make discretionary choices as to whether the disciplinary process should be invoked, and, if so, to what degree they have the discretion to issue non-disciplinary counseling or a written or oral disciplinary warning. They have been specifically instructed to issue discipline. The exercise of this function alone defines them as 2(11) supervisors.

E. The ARD's Determination That Putative Supervisors Do Not Have the Authority To Recommend Raises Was Clearly Erroneous and Prejudicial

US Fibers has traditionally given wage increases in October and April. (Tr. 51). The supervisors were asked for their input regarding which employee should receive raises on April 1. (Tr. 52-53, 147-148, 207; Emp. Exh. 4). In the first week of April, the supervisors gave their input into wage increases. (Id.). The supervisors were asked for similar input in October 2012. (Tr. 147). The Board has consistently found supervisory status where evaluations completed by a putative supervisor directly impact Section 2(11) factors such as promotions and terminations. See *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995) ("[B]ased on the significant role played by the assistant supervisors with respect to annual evaluations, we conclude, contrary to the Regional Director, that the assistant supervisors possess and exercise statutory supervisory authority."); *Virginia Mfg. Co., Inc.*, 311 NLRB 992, 993 (1993) ("We agree with the hearing officer that leadmen . . . are supervisors within the meaning of the Act [based on evidence that they] have exercised independent judgment in evaluating the performance of employees."); *Burns International Security Services, Inc.*, 278 NLRB 565, 570 (1986) (sergeants at a nuclear facility considered supervisors based on significant role in evaluating employees).

The ARD found that Jang testified that management agreed with 90% of the previous year's putative supervisors' recommendations and that the other 10% were disputed because Jang had a different opinion. (Decision, p. 24). In *Venture Industries*, 327 NLRB 918 (1999), the Board found that the requirement of "effectively" recommending a supervisory action is met when the putative supervisor's recommendations are accepted 75% of the time.

F. The ARD's Factual Determination With Respect to Whether Putative Supervisors Direct Employees in Their Work Is Clearly Erroneous and Prejudicial

The record also reflects that Sanchez, Lal, Martinez, and Torres "responsibly direct" employees. In *Oakwood Healthcare, Inc.*, 348 NLRB at 691, the Board found that "[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." For direction to be "responsible," "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." Id. at 692.

In *Croft Metals, Inc.*, 348 NLRB 717 (2007), the Board found that lead persons at a manufacturing facility "directed" their crew members as that Section 2(11) term was defined in *Oakwood Healthcare*. The Board explained, "as part of their duties, the lead persons are required to manage their assigned teams, to correct improper performance, move employees when necessary to do different tasks, and to make decisions about the order in which work is to be performed, all to achieve management-targeted production goals." Id. at 722.

The job duties of the four putative supervisors include exactly the type of activities discussed by the Board in *Croft Metals* in finding the "responsibly direct" element was met.[2] They do not have regular production jobs. They spend their entire work day roaming the plant supervising employees. (Tr. 44). They have multiple lead persons under them. The supervisors are responsible for the efficient operation of the shift. Supervisors are responsible for reviewing the production reports prepared by lead people to make "sure that the operation was running as smooth as possible, trying to find a discrepancy – and if they find any issue with the report, that they do not – they'll try to conduct an investigation to make sure that what has happened, making sure what happened." (Tr. 113, Lines 20-24). Under cross examination, Jang testified as follows:

> Q: Okay, okay. Do supervisors have responsibility for the amount of production?
>
> A: Yes.
>
> Q: They do?
>
> A: Yes.
>
> Q: If certain production is not satisfied, are they penalized?
>
> A: They will receive warnings if it hasn't happened before. They are to make a report about the amount. They have to explain.

(Tr. 153, Lines 2-11).

The Company presented two employee witnesses, Walter Tillman and James Hammond, to testify regarding supervisory direction of work. With reference to putative supervisor David Martinez, witness Tillman stated, "I was introduced to David as my supervisor, that's my supervisor. He didn't say no and none of that. He took me and showed me what I do everyday.

[2] As discussed further below, however, the putative supervisors in this case use "independent judgment" in exercising their authority to responsibly direct employees, unlike the employees in *Croft Metals*.

He has been telling me ever since." (Tr. 183, Lines 18-22). Martinez was introduced as a supervisor by Jang. (Tr. 197). Tillman testified that his supervisor instructs him to switch from one machine to the other "whenever he (the supervisor) feels like you need to be moved." (Tr. 184). In fact, Tillman has been instructed by Martinez to work in another building because "a man went home." (Id.).

Tillman also testified that when he asked Martinez if he could work overtime, Martinez either agreed or disagreed during the same conversation, without checking with anyone. (Tr. 186-187). Tillman testified that his supervisor instructs him to leave his regular job and do other tasks three or four times a month. (Tr. 192). With respect to whether the supervisor gets approval from a Production Manager before making a decision, Tillman said, "No. When he tells me stuff, he don't check with nobody. He don't call nobody. He never said, well, I am going to check or I will let you know. I hear my responses right then." (Tr. 193, Lines 7-10).

The ARD discounted the testimony of Tillman because Tillman's supervisor, David Martinez, was not called as a witness to corroborate Tillman's testimony. To begin with, there is no obligation that a party corroborate uncontested testimony. Further, Tillman's testimony was fully corroborated by James Hammond. Hammond is a Lead Person who works for Martinez. After testifying that Hammond routinely tells him what to do on the job, including what jobs to run and what materials to use, he also assigned overtime. (Tr. 255). He testified as follows:

> Q. Okay. Does he have the authority to tell you folks what to do?
>
> A. Yeah.
>
> Q. And can you give me some examples?
>
> A. All right. For instance, like I said, when I come in, I go to him, I find out what material I've got to run, if I'm working night shift. In the daytime, he comes in with

what material we're running. And if I need overtime, I call him.

Q. Does he tell you whether you can have overtime?

A. Yeah.

Q. Does he tell you immediately or does he tell you he has to check with someone?

A. No, he'll tell me. I mean if it's slow -- I've been there so long, I know what be going on. So if it's slow, I understand. So, yeah, he talks to me.

Q. Now, has he ever called you in for overtime?

A. Yeah.

Q. And how many times?

A. Like I work, let's see, Monday through Thursday, and about Friday, Saturday, or Sunday, he'll call me one of those days, ask me do I want to come. That's every week.

Q. And he just calls you on the phone?

A. Yeah. I mean I ain't the only one he calls. He calls more than me.

Q. Okay.

A. People he can get in touch with.

Q. Has he ever asked you to stop doing what you're doing and go do a different job?

A. If I ain't busy running the machine, just sweeping up or something. If somebody needs some help somewhere, I can do it.

Q. What, he'll ask you to do that?

A. Yeah.

(Tr. 254-56, Lines 22-4).

Putative supervisor Lal also corroborated Tillman. He testified as follows:

Q: What did the Team Leaders do?

A: By being leaders, they checked the materials to be right and they moved the material to be ready for the next shift.

Q: Do they lead the people, too?

A: Yes.

Q: Do you give instructions to the Team Leaders?

A: Sometimes.

Q: Do you give instructions to the other employees underneath you?

A: ***Yes. I tell them what they are going to do and how they are going to do it.***

(Tr. 222, Lines 11- 21) (emphasis added).

To the extent that Tillman's uncontested testimony needs corroboration, it was fully corroborated by Hammond and Lal. Hammond's testimony, although referred to in the Employer's brief, was completely ignored by the ARD. It is also noteworthy that Tillman, Hammond, and Lal testified that supervisors tell employees what to do and gives them specific instructions on how to do it.

Lal also admitted that he decides who to call in to get overtime and that he had the authority to send an employee home if Jang was not there. *Lasar Tool, Inc.*, 320 NLRB 105 (1995) (individual found to be supervisor where had apparent authority to act as onsite person in charge when owner and foreman were away and regularly filled in as supervisor when owner was away); *DST Industries, Inc.*, 310 NLRB 957 (1993) (individual found to be supervisor where regularly filled in for absent supervisor).

Contrary to the ARD, there is ample evidence that the putative supervisors experience "material consequences" as a result of their authority to direct others. Moreover, there is ample evidence they exercise "independent judgment" in directing others.

The ARD cited Jang's testimony that if production requirements are not met, the putative supervisors may receive warnings. (Decision, p. 21). Jang added, however, that no putative supervisor has ever been issued a warning for that reason. (Tr. 153). Consequently, the ARD concluded that because there was no documentary proof to support Jang's testimony and no instances of discipline proffered, the record is insufficient to establish that the putative supervisors are held accountable in responsibly directing employees. (Decision, p. 21). The ARD's reasoning is seriously flawed.

The Employer here has the burden of proving by a preponderance of the evidence the factors necessary to establish supervisory status. The Employer offered evidence in the form of testimony from Jang that putative supervisors may be held accountable for poor crew production. The Union offered absolutely no evidence to rebut Jang's testimony, including for example, testimony from a witness that what Jang said is untrue. Thus, the preponderance of the evidence is that the putative supervisors may be held accountable.

That there are no actual instances of putative supervisors being issued warnings for poor crew performance in no way undermines or discredits Jang's testimony. Perhaps the putative supervisors do a really good job of supervising their crew such that production never declines. Perhaps the production standards are low enough to where it is highly unlikely a putative supervisor could ever be issued a warning. Perhaps none of the four putative supervisors have been held accountable because they haven't been supervisors very long. Any number of reasons could explain why there are no examples of putative supervisors being issued warnings when the

crew's production is poor. For the ARD to implicitly assume that the reason must be because Jang's testimony is untrue is fatal to his conclusions.

The ARD further erred in concluding that the record does not demonstrate the putative supervisors exercise "independent judgment" when responsibly directing employees. The ARD analogizes this case to *Croft Metals, Inc.*, 348 NLRB 717, 722 (2007), in which the Board found that, although the putative supervisors "responsibly directed" employees as the phrase is defined by the Act, they did not meet the "independent judgment" factor because they essentially followed a "preestablished delivery schedule and generally employ a standard loading pattern that dictates the placement of different products in the trucks."

The putative supervisors in the instant case are not overseeing employees stacking trucks pursuant to a set schedule, and there is no evidence they perform similar duties. As Tillman stated, "[Putative supervisor Martinez] took me and showed me what I do everyday. He has been telling me ever since." (Tr. 183, Lines 18-22).

G. The ARD's Factual Determination With Respect To Whether Putative Supervisors Assign Work Is Clearly Erroneous and Prejudicial

In *Oakwood Healthcare*, 348 NLRB at 689, the Board held that "assign," for purposes of Section 2(11), refers to the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.*, tasks, to an employee." The evidence presented at the hearing demonstrates that supervisors set the work schedules for employees, assign them to work particular hours, and grant overtime hours. See *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003) (individual found to be supervisor where authorized to create work schedule, grant time off, and assign hours and overtime); *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 (1992) (individual found to be supervisor where she assigned and reassigned employee to jobs and

reassigned employee at employee's request); *Outboard Marine Corporation*, 307 NLRB 1333 (1992) (individuals found to be supervisors where they were authorized to grant overtime); *Wilshire at Lakewood*, 345 NLRB 1050 (2005) (individual found to be supervisor where independently granted employee requests to leave early to attend to personal matters).

Jang developed a basic format for the shift schedules in his area several years ago. (Tr. 166-167). Since that time, Eduardo Sanchez, Jose Lal, and David Martinez have completed the shift schedules. (Tr. 46). Exhibit 3 was a shift schedule that had been posted for approximately three to four months completed by Sanchez and Lal. (Tr. 166).

The ARD ignored record evidence that the supervisor's prepare work schedules based upon their independent judgment regarding which employees were the best workers, had the most experience, and could operate the machines needed to be operated. The ARD found that this was done "based solely on their ability to operate the machines." (D&D at 19). This ignores record testimony from the Petitioner's witness Jose Lal.

Lal admitted that the discretion of supervisors to assign people to different shifts was based on independent judgment and discretion. He testified that he and Sanchez assigned employees to different shifts based on "experience." (Tr. 226-227). He testified as follows:

> Q: What do you mean by experience?
>
> A: They work better and they know a little bit more about the materials.
>
> Q: Okay. And did you and Eduardo, working together, decide that they were better workers and they knew more about the material?
>
> A: Yes.
>
> Q: Did you consider whether they knew how to operate different machines or just one machine?

A: Yes.

(Tr. 227, Lines 9-17). This testimony shows that Lal and Sanchez used their independent judgment to make subjective decisions about which employees were better workers and knew about the materials. They also made value judgments that employees who could operate more than one machine would be more appropriate for a particular shift than others. *American River Transportation Co.*, 347 NLRB 925 (2006) (individuals found to be supervisors where they have the authority to make assignments and reassignments of crew based on determination of which crew members perform best in certain positions).

Supervisors can also call in employees to work overtime or award overtime. When an employee is absent or additional help is needed, supervisors can call in other employees at their discretion. (Tr. 142). This awards overtime opportunities to the called employees. (Id.). While Lal stated he usually checked with Jang, he admitted that he could call in employees in Jang's absence and even when Jang approved working overtime, Lal always selected which employees to call. (Tr. 214-215). The putative supervisors also have the authority to instruct employees to stop performing one task and go to another location and perform another task as needed during the day. (Tr. 183-187, 254-260). They can allow an employee to leave during the work day and excuse employees early. (Id.).

The ARD erroneously relies on *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. (2012), to support her conclusion that the putative supervisors do not have the authority to assign employees using independent judgment. In that case, he Board observed that any authority the crew dispatchers and line controllers had to assign and direct operators was "either routine or significantly limited by the Employer's SOP [Standard Operating Procedure] and troubleshooting manuals, as well as by its collective-bargaining agreement

covering the operators, and thus does not involve the exercise of independent judgment required under Section 2(11)." *Id.* at 4. *Alternate Concepts* is easily distinguishable.

As an initial matter, *Alternate Concepts* involved putative supervisors who performed traditional dispatching duties, and dispatchers have historically been not be found to be supervisors. Indeed, the Board even expressly mentioned that fact in footnote 16 of its decision: "The Board, in the past, has found similar facts to give rise to the conclusion that dispatchers are not supervisors." 358 NLRB at 4, fn. 16 (citing *St. Petersburg Limousine Service*, 223 NLRB 209 (1976); *Southwest Airlines Co.*, 239 NLRB 1253 (1978); and *Bay Area – Los Angeles Express*, 275 NLRB 1063 (1985)).

More importantly, however, the authority of the putative supervisors in *Alternate Concepts* is vastly different from the authority of the putative supervisors here. In *Alternate Concepts*, for example, the Board observed, "There is little or no flexibility in the SOP manual for the operation of the trains, as the options in particular circumstances are essentially predetermined, and employees have been trained to recognize that there are certain, specific actions that must be undertaken in various situations." *Alternate Concepts*, 358 NLRB at 5. One witness in that case even testified, "You wouldn't exactly be flexible with the Standard Operating Procedures. Those are pretty much set in stone." *Id.* Here, there is evidence that the putative supervisors do not follow written manuals in making assignments.

As stated above, the ARD ignored record evidence that the supervisor's prepare work schedules based upon their independent judgment regarding which employees were the best workers, had the most experience, and could operate the machines needed to be operated. There

is simply no evidence that they merely follow a written procedural manual in making these decisions.

H. The Secondary Indicia Compels a Finding of 2(11) Status

Where the putative supervisor engages in at least one supervisory function listed in Section 2(11), the Board may also consider secondary indicia of supervisory authority. *Pacific Beach Corp.*, 344 NLRB 1160, 1161 (2005); *Progressive Transportation Services*, 340 NLRB 1044 (2003); *SAIE Motor Freight, Inc.*, 334 NLRB 979 (2001); *McClatchy Newspapers, Inc.*, 307 NLRB 773 (1992); *Burns International Security Services, Inc.*, 278 NLRB 565 (1986).

Although all employees in the plant are hourly, the supervisors make considerably more money per hour than the employees they supervise. In fact, they make approximately $2.00 per hour more. See *American River Transportation Co.*, 347 NLRB 925 (finding as secondary indicia of supervisory status that individuals received higher pay than employees); *Mountaineer Park, Inc.*, 343 NLRB 1473 (2005) (same).

Further, they are not assigned a particular location and do not perform significant production duties. They may occasionally fill in for an employee if necessary during an emergency, but their primary job is to move through their area of responsibility and supervise employees.

The ratio of supervisors to employees is also indicative of supervisory status. As noted above, while the leads supervise small groups of employees, each supervisor supervises 25 to 40 people. If Jang were the only supervisor, he would be in charge of 75 employees working 24 hours a day spread over several hundred thousand square feet. Further, he cannot communicate with most of them. *Colorflow Decorator Products, Inc.*, 228 NLRB at 410 (two supervisors overseeing almost 50 employees for a substantial portion of time is disproportionate and weighs

in favor of finding that a third individual in question also was a supervisor); *Formco, Inc.*, 245 NLRB 127 (1979) (finding that unless foremen were supervisors, there would be a disproportionate employee-to-supervisor ratio of 30 to 1 and perhaps 70 to 1).

I. The Putative Supervisors' Authority Is Held In The Interest Of The Employer

The third prong of the Supreme Court's test considers whether the putative supervisor's authority is held in the interest of the employer. *Kentucky River*, 532 U.S. at 713. This prong is satisfied where the supervisor duties at issue "are a necessary incident to the production of goods or the provision of services." *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994).

There is no doubt that the supervisor's authority is held in the interest of the employer while the supervisor performing their job duties were assisting in the production of US Fibers products. (Tr. 63-64). Their job duties are essential to the operations of US Fibers. (Id.).

IV. CONCLUSION

The ARD's decision regarding whether Sanchez, Lal, Martinez, and Torres are supervisors was based on clearly erroneous factual determinations regarding their authority to discipline, ability to effectively recommend employee pay increases, direction of employee work, and assignment of employees to work particular hours and overtime. The ARD's decision also departed from official Board precedent by determining that disciplinary warnings are not considered "discipline" for purposes of 2(11) analysis and her decision that the actual issuance of discipline, rather than the authority to do so, is necessary for 2(11) status.

For the foregoing reasons, the Employer requests that the Board review the decision of the ARD and reverse it.

Respectfully submitted,

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Dated this 16th day of May 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

CERTIFICATE OF SERVICE

I, Jonathan P. Pearson, do hereby certify that I have on this 16th day of May, 2013, served a copy of the Employer's Request For Review upon the following by email:

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FORM NLRB-760
(7-10)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Date Filed
Mar 26, 2013

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and

UNITED STEEL, PAPER AND FORESTY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Petitioner

Case No. 10-RC-101166

Date Issued 05/30/2013

City TRENTON State SC

Type of Election: *(Check one:)*

- ☐ Stipulation
- ☐ Board Direction
- ☐ Consent Agreement
- ☒ RD Direction
  Incumbent Union (Code)

(If applicable check either or both:)

- ☐ 8(b) (7)
- ☐ Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters — 137
2. Number of Void ballots — 0
3. Number of Votes cast for UNITED STEEL, PAPER AND FORESTY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898 — 71
4. Number of Votes cast for —
5. Number of Votes cast for —
6. Number of Votes cast against participating labor organization(s) — 59
7. Number of Valid votes counted (sum 3, 4, 5, and 6) — 130
8. Number of challenged ballots — 7
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) — 137
10. Challenges are (~~not~~) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for UNITED STEEL, PAPER AND FORESTY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

For the Regional Director [signature]

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For PAC TELL GROUP, INC. D/B/A U.S. FIBERS Refused to sign — Nicholas A. Rowe, Board Agent — 05/30/13

For UNITED STEEL, PAPER AND FORESTY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898 [signature]

For

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC.,
d/b/a U.S. FIBERS
Employer

and Case 10-RC-101166

UNITED STEEL, PAPER, AND
FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL AND
SERVICE WORKERS INTERNATIONAL
UNION, LOCAL 7898
Petitioner

ORDER

The Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election raises a substantial issue with respect to the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres. We conclude, however, that this issue may best be resolved through the use of the Board's challenge procedure. Accordingly, the Decision is amended to permit Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres to vote under challenge, and the Request for Review is denied.

MARK GASTON PEARCE, CHAIRMAN

RICHARD F. GRIFFIN, JR., MEMBER

SHARON BLOCK, MEMBER

Dated, Washington, D.C., May 31, 2013.

********** -COMM. JOURNAL- ********** DATE MAY-31-2013 ***** TIME 09:54 ********

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NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE EXECUTIVE SECRETARY

FACSIMILE TRANSMITTAL SHEET

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NORMAN J SLAWSKY
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REGION 10

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ASSOCIATE EXECUTIVE SECRETARY

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Re: PAC TELL GROUP, INC.
D/B/A U.S. FIBERS
CASE 10-RC-101166

ALL CONFIRMATIONS: BLANK

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

EMPLOYER'S MOTION FOR RECONSIDERATION OF ORDER ON REQUEST FOR REVIEW

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June 14, 2013

I. INTRODUCTION

Pursuant to Section 102.65(e)(1) of the Board's Rules and Regulations, the Employer Pac Tell Group, Inc. d/b/a U.S. Fibers (US Fibers or the Employer), by and through the undersigned counsel, hereby files this motion for reconsideration of the Board's May 31, 2013[1] Order denying the Employer's request for review of the Acting Regional Director's Decision and Direction of Election.[2] The Board should reconsider its order and grant the request for review because the "substantial issue" the Board acknowledged the Employer raised regarding the supervisory status of Eduardo Sanchez, Aduaco Torres, Jose Lal, and David Martinez was not resolved by the challenge procedure as contemplated by the Board. Further, the existence of new evidence that was not available at the time of the hearing also justifies granting the Employer's request for review.

II. BACKGROUND

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 (the Union), filed a petition on March 26 seeking to represent "all production, janitorial, warehousemen, shipping, and maintenance workers at the Trenton, South Carolina plant, but excluding all managers and supervisors as defined under the Act." The Employer challenged the Union's attempt to carve out the Trenton facility of its South Carolina operations and sought to add its facility at 1100 Church Street, Laurens, South Carolina, to any bargaining unit. The Employer also sought to exclude from the

[1]All dates referenced herein are to 2013, unless otherwise indicated.

[2]Given the current and pending issues regarding the ability of the Board to enter final orders and judgments, see *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the Employer respectfully requests that the Board consider holding any final decision on this matter in abeyance until the Board's status to render final orders and judgments is resolved. While the Employer understands the Board's position that it is constitutionally assembled and has authority to issue final orders and judgment, significant authority exists to the contrary. For this reason, the Employer, like all other employers with matters pending before the Board, is forced to take definitive actions to preserve its rights related to the *Noel Canning* decision. For the sake of judicial efficiency and to avoid unnecessary litigation, holding this matter in abeyance rather than issuing a final order would ultimately benefit the best interest of all parties.

unit Sanchez, Torres, Lal, and Martinez on the ground that they are "supervisors" as defined by Section 2(11) of the Act.

A hearing was held in Aiken, South Carolina, on April 18. On May 3, the Acting Regional Director issued her decision rejecting the Employer's arguments concerning the scope and composition of the unit and directing an election in the petitioned-for unit. On May 16, the Employer filed a request for review of the Acting Regional Director's decision to exclude the putative supervisors from the unit.

An election was conducted on May 29-30. The tally of ballots showed 71 votes for and 59 against the Union, with 7 challenged ballots. Sanchez, Lal, Martinez, and Torres were all challenged by the Employer's observer during the election.

On May 31, the Board issued its order acknowledging that the Employer's request for review "raises a substantial issue with respect to the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres," but concluding that the issue "may best be resolved through the use of the Board's challenge procedure." Consequently, the Board denied the Employer's request for review.

On June 6, the Employer filed objections to conduct affecting the results of the election. The objections allege, inter alia, that the prounion conduct of the putative supervisors during the critical period and on the day of the election coerced and interfered with employees' free choice in the election thereby tainting the process and warranting dismissal of the petition or, in the alternative, a rerun election in an environment free from supervisor coercion and interference.[3]

[3]Such conduct includes putative supervisors actively soliciting union authorization cards from employees; threatening employees with discipline/discharge if they voted for the Employer and/or if they exercised their right to participate in the election; attending and speaking on behalf of the Union at Union meetings; making misrepresentations about Employer wages/benefits in an effort to influence employees' votes in the election; asking employees who they intend to vote for in a threatening and intimidating manner; telling employees they are "crazy' if they vote for the Employer; telling employees they (the supervisors) will be union leaders and would fire those supporting the Employer; telling employees to "think hard" before voting for the Employer while said employees

On June 13, the Employer submitted its evidence supporting the objections to the Region pursuant to Section 102.69(a).

III. GROUNDS FOR RECONSIDERATION

Section 102.65(e)(1) provides, in pertinent part, that "[a] party to a proceeding may, because of extraordinary circumstances, move . . . after the decision or report for reconsideration, for rehearing, or to reopen the record . . . ." Here, "extraordinary circumstances" plainly exist for the Board to reconsider its initial denial of the Employer's request for review because, although the number of challenged ballots cast by the putative supervisors is insufficient to affect the results of the election, substantial evidence demonstrates that these individuals, acting on behalf of the Union and/or with its implied endorsement, coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions.

In *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004), the Board set forth a two-prong test to determine whether the prounion activity of a supervisor will be held to constitute objectionable conduct. The first prong of the test requires "consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct." Id. Thus, a crucial issue in resolving the Employer's objections under *Harborside* is whether Sanchez, Torres, Lal, and Martinez are statutory supervisors.[4]

Because the Board found that a "substantial issue" exists with respect to the supervisory status of Sanchez, Torres, Lal, and Martinez, and because the issue was not resolved through the challenge procedure, the Board should reconsider its decision to deny the Employer's request for

---

were on a "line of march" to the polling place to vote; exercising their supervisory responsibilities and assigning new/different duties to employees because they did not support the Union; admitting at the polling location that they are a supervisor when questioned about their job duties by the Board agent; and threatening employees that the Union would send all signed authorization cards to the Employer if the Union did not win the election. This evidence was not available or known at the time of the April 18 hearing.

[4]The supervisory status of these individuals is also an issue in the pending investigations of the unfair labor practice charges filed by the Union and the Employer.

review. Upon reconsideration, the Board should grant the Employer's request for review for the reasons stated therein and reverse the Acting Regional Director's determination that the individuals in questions are not supervisors under Section 2(11) of the Act.[5]

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June 14, 2013

[5]In the event the Board grants the Employer's request for review but determines that the record below is insufficient to warrant reversing the Acting Regional Director's decision, the Board should, pursuant to Sec. 102.65(e)(1), reopen the record or grant a rehearing to allow the Employer to present newly discovered evidence as to supervisory status that was not available at the April 18 hearing. Such evidence includes, but is not necessarily limited to, testimony and documentation that putative supervisors have, since the April 18 hearing, exercised their supervisory authority using independent judgment in the interest of the Employer to discipline employees, assign overtime, approve time off, assign and direct employees in their work, and evaluate employee performance. Evidence also exists that putative supervisors have admitted under oath and to Board officials to being supervisors. This evidence was not presented at the hearing because it did not exist at that time.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

CERTIFICATE OF SERVICE

I, Jonathan P. Pearson, do hereby certify that I have on this 14th day of June, 2013, served a copy of the Employer's Motion for Reconsideration of Order on Request for Review upon the following by email:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC.,
d/b/a U.S. FIBERS
Employer

and Case 10-RC-101166

UNITED STEEL, PAPER AND
FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL AND
SERVICE WORKERS INTERNATIONAL
UNION, LOCAL 7898
Petitioner

ORDER

The Employer's Motion for Reconsideration of the Board's May 31, 2013 Order denying review of the Acting Regional Director's Decision and Direction of Election is denied.[1]

MARK GASTON PEARCE, CHAIRMAN

RICHARD F. GRIFFIN, JR., MEMBER

SHARON BLOCK, MEMBER

Dated, Washington, D.C., June 26, 2013.

[1] The Motion is denied without prejudice to the Employer renewing its arguments as to the alleged supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres on exceptions to a report on objections or on a request for review of the Regional Director's decision.

The Employer, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), petition for cert. granted June 24, 2013 (No. 12-1281), contends that the Board should hold the proceeding in abeyance "until the Board's status to render final orders and judgments is resolved." For the reasons stated in *Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013), this argument is rejected.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC. d/b/a U.S. FIBERS and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898	**Cases** 10-RC-101166 DATE OF SERVICE June 26, 2013

AFFIDAVIT OF SERVICE OF BOARD ORDER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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Subscribed and sworn before me this 26TH day of June 2013.	DESIGNATED AGENT BERTHA DINKINS NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

EMPLOYER'S OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

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June 6, 2013

I. INTRODUCTION

Pursuant to Section 102.69(a) of the Board's Rules and Regulations, the Employer Pac Tell Group, Inc. d/b/a U.S. Fibers, by and through the undersigned counsel, hereby files these objections to conduct affecting the results of the election held May 29-30, 2013,[1] at the Employer's Trenton, South Carolina facility.

II. PRELIMINARY STATEMENT

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 ("the Union"), filed a petition on March 26 seeking to represent "all production, janitorial, warehousemen, shipping, and maintenance workers at the Trenton, South Carolina plant, but excluding all managers and supervisors as defined under the Act." The Employer challenged the Union's attempt to carve out the Trenton facility of its South Carolina operations and sought to add its facility at 1100 Church Street, Laurens, South Carolina, to any bargaining unit. The Employer also sought to exclude from the unit four individuals, Eduardo Sanchez, Aduaco Torres, Jose Lal, and David Martinez, on the grounds that they are "supervisors" as defined by Section 2(11) of the Act.

A hearing was held in Aiken, South Carolina, on April 18. On May 3, the Acting Regional Director issued a Decision and Direction of Election rejecting the Employer's arguments concerning the scope and composition of the unit and directing an election in the petitioned-for unit. On May 16, the Employer filed a request for review of the Acting Regional Director's decision to exclude the putative supervisors from the unit.

An election was held on May 29-30. The tally of ballots showed 71 votes for and 59 against the Union, with 7 challenged ballots.

[1] All dates referenced herein are to 2013, unless otherwise indicated.

On May 31, the Board issued an order stating that the Employer's request for review "raises a substantial issue with respect to the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres," but concluding that the issue "may best be resolved through the use of the Board's challenge procedure." Consequently, the Board denied the Employer's request for review.

III. OBJECTIONS

Objection 1

During the critical period, supervisors and/or third parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by soliciting union authorization cards from employees.

Objection 2

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by threatening employees with discipline/discharge if they voted for the Company and/or if they exercised their right to participate in the election.

Objection 3

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by attending and speaking on behalf of the Union at Union meetings.

Objection 4

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions

by making misrepresentations about Company wages/benefits in an effort to influence employees' votes in the election.

Objection 5

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by making references to where employees live in a threatening and intimidating manner.

Objection 6

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by asking employees who they intend to vote for in a threatening and intimidating manner.

Objection 7

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by telling employees they are "crazy' if they vote for the Company.

Objection 8

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by threatening and/or implying physical harm to employees who vote for the Company.

Objection 9

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by telling employees they (the supervisors) will be union leaders and would fire those supporting the Company.

Objection 10

On the day of the election, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by telling employees to "think hard" before voting for the Company while said employees were on a "line of march" to the polling place to vote.

Objection 11

During the critical period, supervisors and/or third parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by exercising their supervisory responsibilities and assigning new/different duties to employees because they did not support the Union.

Objection 12

On the day of the election, a supervisor and/or a third-party coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by admitting at the polling location that he was a supervisor when questioned about his job duties by the Board agent.

Objection 13

During the critical period, supervisors and/or third parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by threatening employees that the Union would send all signed authorization cards to the Employer if the Union did not win the election.

Objection 14

The Union, by and through its agents, officers, and representatives acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and

destroyed the necessary laboratory conditions by having knowledge of and acquiescing in pro-union conduct by supervisors as defined by Section 2(11) of the Act, including the threats, coercion, and intimidation tactics described in the above objections.

Objection 15

The Union, by and through its agents, officers, and representatives acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by campaigning in such a way as to inflame racial and/or ethnic prejudice of employees, deliberately seeking to overemphasize and exacerbate racial and/or ethnic feelings by irrelevant, inflammatory appeals.

Objection 16

The Union, by and through its agents, officers, and representatives acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by harassing and coercing employees who expressed opposition to the Union and/or who were selected to act as observers during the election.

IV. CONCLUSION

In light of the above-described objectionable conduct, the Employer requests that the petition be dismissed or, in the alternative, that the election held on May 29-30 be set aside and a re-run election be held in an environment free from Union, third-party, and/or supervisor coercion and intimidation. In the alternative, the Employer requests, pursuant to Section 102.69(d) of the Board's Rules and Regulations, that an evidentiary hearing be directed and held on the issues raised herein, including whether Sanchez, Torres, Lal, and Martinez are supervisors

under the Act given the Board's determination that "substantial issues" on the issue exist and in light of new evidence surrounding these individuals' job duties.

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June 6, 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and

Case 10-RC-101166

UNITED STEEL, PAPER, AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Petitioner

REPORT ON OBJECTIONS
AND
NOTICE OF HEARING

Pursuant to a petition filed by the Petitioner on March 26, 2013,[1] and a Decision and Direction of Election issued by the Acting Regional Director on May 3, an election by secret ballot was conducted on May 29 and 30, to determine whether the Employer's unit[2] employees desired to be represented by the Petitioner for purposes of collective bargaining.

The tally of ballots made available to the parties at the conclusion of the election discloses the following results:

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[1] All dates are in the year 2013 unless otherwise specified.

[2] The appropriate unit of employees set forth in the Decision and Direction of Election is: "All full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees, employed by the Employer at its Trenton, South Carolina facility, excluding all other employees, including office clerical employees, professional and confidential employees, and guards and supervisors as defined in the Act."

Approximate number of eligible voters	137
Void ballots	0
Votes cast for Union	71
Votes cast against participating labor organization	59
Challenged ballots	7
Valid votes counted plus challenged ballots	137

The challenged ballots are not sufficient in number to affect the results of the election.

On June 6, the Employer filed timely objections, copy attached as Appendix A, to conduct affecting the results of the election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the issues raised by the Objections was conducted under my direction and supervision. After considering the evidence submitted in support of the Objections, the undersigned finds that the remaining Objections[3] raise substantial and material issues which can best be resolved by the conduct of a hearing as hereafter provided.

THE OBJECTIONS[4]

Overview

In its Objections, the Employer asserts that during the critical period, supervisors and/or third parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions to hold the election by engaging in the conduct summarized individually as set forth below. The putative supervisors who are alleged to have engaged in the conduct are Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres. In

[3] Objections 5, 15, and 16 have been withdrawn and will not be considered further. The remaining objections retain their original enumeration.

[4] The Petitioner denies engaging in any objectionable conduct and asserts the Objections should be overruled in their entirety.

the Decision and Direction of Election it was concluded that the Employer had not met its burden of establishing their supervisory status as it contended during the pre-election hearing.

On May 16, the Employer filed a request for review of the determination in the Decision and Direction of Election. On May 31, the Board issued an order stating that the request for review raised a substantial issue with respect to the status of those four individuals but concluded the issue may best be resolved through the use of the Board's challenge procedure. In accordance with that determination, the Board denied the request for review. Because the ballots which were challenged during the election were not sufficient in number to affect the results of the election, the status of the four putative supervisors remains in doubt.

Inasmuch as the status of these individuals undoubtedly will impact the consideration of the merits of the Objections, I will direct that the parties submit additional evidence at the hearing which will enable the hearing officer to make recommendations[5] to me as the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres.

Objection 1

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties improperly solicited union authorization cards from employees.

In support of this Objection, the Employer submitted employee witness statements in which they state that the purported supervisors attended union meetings (no dates given) and were involved in getting support for the Petitioner. Some assert that David Martinez and Jose Lal actively spoke on behalf of the union during the meetings. It is not clear if these were the

[5] I further direct the hearing officer to take notice of the pre-election hearing transcript, and the parties' submissions on the issue in order that a complete record is available for consideration of the issue.

same meetings during which authorization cards were being solicited, but the statements imply that. None of the witnesses specifically assert that Martinez, Sanchez or Torres gave them or solicited authorization cards directly from them. However, one employee states that he saw Jose Lal give two union cards to employees at approximately 11 p.m. about a month prior to the election.

Objection 2

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties threatened employees with discipline/discharge if they voted for the Employer and/or if they exercised their right to participate in the election.

In support of this Objection, the Employer submitted the statement of an employee who states that about a week prior to the election, David Martinez stated that if the union wins, then maybe some people will no longer work here anymore, referring to the employees who supported the company. A second witness asserts that other employees he knew had heard David Martinez say he would be a union leader and would be able to fire the people who voted for the company. The witness states that a lot of co-workers were looking for jobs because those threats.

A third witness states that a few weeks prior to the election, sometime between 4 and 5 a.m., he heard Jose Lal tell a group of employees that if they did not sign union cards, that it would be very easy for him to fire employees.

Objection 3

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties attended and spoke on behalf of the Petitioner at union meetings.

In support of this Objection, the Employer submitted the statements of several employee witnesses who assert that the purported supervisors attended union meetings and that David Martinez and Jose Lal actively campaigned on behalf of the union. The Employer also asserted that Aduaco Torres wore a Steelworkers' t-shirt during the week of the election and was featured in a photograph on the Petitioner's website celebrating the union's election victory.

Objection 4

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties made representations about Employer wages/benefits in an effort to influence employees' votes in the election.

In support of this Objection, the Employer submitted a statement of an employee who states that during a union meeting Jose Lal claimed that the company did not pay full benefits to the employees.

Objections 6 and 7

In Objection 6, the Employer asserts that during the critical period, supervisors and/or third parties asked employees who they intended to vote for in a threatening and intimidating manner. In Objection 7, the Employer asserts that during the critical period, supervisors and/or third parties told employees they are crazy if the vote for the Employer.

In support of these Objections, the Employer submitted a statement of an employee who says that about a week before the election, David Martinez asked who he was voting for. He

avers that after he responded he was voting for the company, Martinez responded "you're crazy for trying to vote for the Company."

Objection 8

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties threatened and/or implied physical harm to employees who voted for the Employer.

In support of this Objection, the Employer submitted a statement of an employee who asserts that a few days before the election, an employee named Pablo told him that if he voted for the company that "you don't know what they think of you or what the guys are going to do to you."

Objection 9

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties told employees that they (the supervisors) would be union leaders and would fire those who supported the Employer.

In support of this Objection, the Employer submitted a statement of an employee who asserts that other employees he knew had heard Martinez say he would be a union leader and would be able to fire the people who voted for the company.

Objection 10

In this Objection, the Employer asserts that on the day of the election, supervisors and/or third parties told employees to "think hard" before voting for the Employer while said employees were on a "line of march" to the polling place to vote.

In support of this Objection, the Employer submitted the statement of a witness who says that on the day of the election as they were walking on their way to vote, Martinez came into a group of six employees and kept telling them that they needed to think hard before they voted for the company and told them that production manager Lang would return and that would not be good for them.

Objection 11

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties exercised their supervisory responsibilities and assigned new/different duties to employees because they did not support the Petitioner.

In support of this Objection, the Employer submitted a statement of an employee who asserts that about a week prior to the election, David Martinez assigned him to "break the rocks", an assignment he had not been given before unless he came in on overtime. The witness averred that during an earlier union meeting during which Martinez was talking on behalf of the union, the witness told Martinez that he (the employee witness) was not in favor of the union.

Objection 12

In this Objection, the Employer asserts that on the day of the election, a supervisor and/or third party admitted at the polling location that he was a supervisor when questioned about his job duties by the Board agent conducting the election.

In support of this Objection, the Employer submitted the statement of an employee who contends that when David Martinez's ballot was challenged during the election on the ground that the he was a supervisor, the Board agent conducting the election asked him what he did at the plant to which Martinez replied he "supervised lines I, II, III and IV."

Objection 13

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties threatened that the Petitioner would send all signed authorization cards to the Employer if the Petitioner did not win the election.

In support of this Objection, the Employer presented the statement of an employee who states that there were rumors that if the company won the campaign, that the union was going to send the cards to the owners so they would fire the people who signed cards.

Objection 14

In this Objection, the Employer asserts that the Petitioner, through and by its agents, officers, and representatives acting on its behalf or with its implied endorsement destroyed the necessary laboratory conditions by having knowledge of and acquiescing in pro-union conduct by supervisors as defined by Section 2(11) of the Act.

In support of this Objection, the Employer relies on the evidence submitted in support of its other objections.

CONCLUSION

If the Employer can establish that supervisors, agents of the Petitioner, or third parties have engaged in the acts alleged in the Objections, such conduct may warrant setting aside the results of the election. Inasmuch as substantial and material issues of fact and law exist with respect to whether the conduct occurred, I find that the issues can best be resolved on the basis of record testimony at a hearing conducted before a duly designated hearing officer. Accordingly, I will direct that a hearing be held with respect to the Employer's Objections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14. I shall also direct that during the hearing that additional evidence be

submitted with respect to the alleged supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres.

ORDER DIRECTING HEARING

IT IS HEREBY ORDERED, pursuant to Section 102.69 of the Board's Rules and Regulations, hereafter called the Board's Rules, that a hearing be held to resolve the issues raised by the evidence submitted by the Employer in support of its Objections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14 and to obtain additional evidence as to the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres as resolution of that issue may directly impact the resolution of the Objections.

IT IS FURTHER ORDERED that the hearing officer designated to conduct the hearing will prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact and recommendations to the **Regional Director** as to the disposition of the issues. Within 14 days from the date of the issuance of such report, or within such further period as the Regional Director may allow upon written request to the undersigned for an extension of time, under the provisions of Secs. 102.69 and 102.67, either party may file with the undersigned exceptions to the Hearing Officer's Report with supporting brief. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof, together with any brief filed, on the other parties.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 1st day of July, 2013, at 1 p.m. at the Aiken County Courthouse, Courtroom #5, Second Floor, 109 Park Avenue, SE, Aiken, South Carolina, a hearing will commence before a duly designated Hearing Officer of the National Labor Relations Board on the Objections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14 and the supervisory

status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres, and will be conducted on consecutive days thereafter until completed, at which time and place you will have the right to appear, or otherwise, give testimony and to examine and cross examine witnesses.

Dated at Winston-Salem, North Carolina, this 17th day of June 2013.

Claude T. Harrell Jr., Regional Director
National Labor Relations Board
Region 10
233 Peachtree St. NE, Suite 1000
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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC. D/B/A US FIBERS Employer and **UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898** Petitioner	**Case 10-RC-101166**

AFFIDAVIT OF SERVICE OF: Report on Objections and Notice of Hearing dated June 17, 2013.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on June 17, 2013, I served the above-entitled document(s) by facsimile and regular mail upon the following persons, addressed to them at the following addresses:

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June 17, 2013
Date

JOSELLE CHATMAN, Designated Agent of NLRB
Name

/s/ JOSELLE CHATMAN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and

Case 10-RC-101166

UNITED STEEL, PAPER, AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS AND RECOMMENDATION TO THE REGIONAL DIRECTOR

I. Introduction

Pursuant to a petition filed by the Petitioner on March 26, 2013,[1] and a Decision and Direction of Election[2] issued by the Acting Regional Director on May 3, an election by secret

[1] All dates are in the year 2013 unless otherwise specified.

[2] A pre-election hearing was conducted by a hearing officer of the Board on April 18. One of the two issues litigated was whether four individuals, labeled by the Employer as "supervisors," were supervisors under Section 2(11) of the Act, and should therefore, be excluded from the unit. On May 3, the Acting Regional Director for Region 10, Subregion 11, issued a Decision and Direction of Election finding that the four individuals, specifically Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres, were not supervisors under the Act. On May 16, the Employer filed a Request for Review of the Acting Regional Director's Decision and Direction of Election raising an issue with respect to the supervisory status of the four named employees. On May 31, the Board denied the Employer's Request for Review noting that although the Employer's Request for Review raises a substantial issue regarding the supervisory status of the named employees and that the matter may best be resolved through the use of the Board's challenge procedure. On June 14, the Employer filed a Motion for Reconsideration of the Board's Order denying the Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election and asserted that the supervisory issue was not resolved by

ballot was conducted on May 29 and 30, and the tally of ballots reflects that 71 votes were cast for the Petitioner, 59 votes were cast against the Petitioner, and that there were seven challenged ballots. The challenges were insufficient to affect the outcome of the election.[3] On June 6, the Employer filed timely objections to conduct affecting the results of the election.[4] In its Objections, the Employer asserts that during the critical period, four putative supervisors, including Production Supervisor Eduardo Sanchez (Sanchez), Production Supervisor Jose Lal (Lal), Recycle Operation Supervisor David Martinez (Martinez), and Finish Supervisor Aduaco Torres (Torres), engaged in conduct that coerced and interfered with employees' free choice in the election.

On June 17, pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional Director for Region 10 issued a Report on Objections and Notice of Hearing finding that the Employer's Objections raised substantial and material issues best resolved by the conduct of a hearing.[5] The Regional Director directed the parties to submit additional evidence at a hearing to enable the hearing officer to make recommendations as to the supervisory status of Sanchez, Lal, Martinez, and Torres. The Regional Director directed the hearing officer to take notice of the pre-election hearing transcript and the parties' submissions in that proceeding regarding the supervisory issue.

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the challenge procedure. On June 26, the Board denied the Employer's Motion for Reconsideration without prejudice to the Employer renewing its arguments on exceptions to a report on objections or on a request for review of the Regional Director's decision.

[3] The appropriate unit of employees set forth in the Decision and Direction of Election is: "All full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees, employed by the Employer at its Trenton, South Carolina facility, excluding all other employees, including office clerical employees, professional and confidential employees, and guards and supervisors as defined in the Act.

[4] A copy of the objections are attached hereto as Appendix A

[5] A copy of the Regional Director's Report on Objections and Notice of Hearing is attached as Appendix B.

On July 1, 2, and 3, a hearing was held in Aiken, South Carolina, in which the Employer and the Petitioner were afforded the opportunity to submit evidence regarding the supervisory status of Lal, Sanchez, Martinez, and Torres,[6], and the Objections. The Objections allege that the putative supervisors engaged in conduct during the critical period that interfered with the employees' free choice in the election. The Employer seeks to have the election set aside and a second election directed or, alternatively, dismissal of the petition with prejudice. The Petitioner takes the position that the putative supervisors are not supervisors within the meaning of the Act, and even if the putative supervisors engaged in the conduct alleged, the conduct does not amount to objectionable conduct. The Petitioner urges the Regional Director to overrule the Objections and to certify the Petitioner as the collective bargaining representative of the unit employees.

I recommend that the Regional Director sustain the Employer's Objections and direct a second election as the record establishes that the four putative supervisors possess at least one of the primary indicia of supervisory status. Moreover, the record establishes that the supervisors engaged in objectionable conduct, the nature, extent and context of which warrants setting aside the election. In support of my recommendation, below is a description of the Employer's operation, a discussion of the applicable standard for examining the presence of supervisory status, a discussion of the evidence presented in support of each objection, and an analysis of the alleged prounion supervisory conduct in accordance with *Harborside Healthcare*, 343 NLRB 906 (2004).

II. <u>The Employer's Operation</u>:

The Employer operates a plant in Trenton, South Carolina, where it is engaged in the processing and manufacture of recycled polyester fiber. The plant consists of four buildings

[6] Lal, Sanchez, Martinez, and Torres are referred to collectively as "putative supervisors."

covering 500,000 to 600,000 square feet. The Employer employs two salaried production managers, Glenn Jang (Jang), who oversees employees in the Extrusion and Recycling Departments, and Kyong Kang (Kang) who oversees employees in the Finishing Department. Jang and Kang report to the Director of Manufacturing Kevin Corey. Corey reports to Vice-President Ted Oh. Production Supervisors Eduardo Sanchez and Jose Lal, and Recycle Operation Supervisor David Martinez, who work in the Extrusion Department, report to Jang. Finish Supervisor Aduaco Torres, who works in the Finishing Department, reports to Kang. From an organizational view, between the production managers and the unit employees are the putative supervisors. The unit employees consists of the production and maintenance employees who are assigned to work in a group comprised of 3-5 employees, with one of the more experienced employees in each group being designated as the lead.

III. The Board's Standard for Supervisory Status

Section 2(11) of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving supervisory authority rests with the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) citing *NLRB v. Kentucky River Community Care*, 532 U. S. 706, 713 (2001). To establish supervisory status, the moving party must show by a preponderance of the evidence: (1) that the employee held authority to engage in one of the 12 enumerated supervisory functions listed in Section 2(11); (2) that the exercise of the authority was not of a merely routine or clerical nature but required use of independent judgment; and (3)

that the authority was held in the interest of the employer. [7] "To exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692-693. "As a general principle, the Board has exercised caution 'not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.'" *Oakwood,* at 688, quoting *Chevron Shipping Co*, 317 NLRB 379, 381 1995). "When evidence is inconclusive on a particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia." *Custom Mattress Mfg., Inc.* 327 NLRB 111, 112 (1998) citing, *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *The Door*, 297 NLRB 601 fn. 5 (1990). However, if one of the enumerated indicia of supervisory status is present, the Board will consider evidence of secondary indicia. *Billows Elec. Supply of Northfield, Inc.*, 311 NLRB 878 fn 2 (1993)

In accordance with the directions of the Regional Director in his Report on Objections, the Employer offered additional evidence at the post-election hearing to establish that the four putative supervisors had the authority to issue, or to effectively recommend the issuance of, discipline, to assign and direct the work of employees, and to reward employees.[8] For the reasons set forth below, I find that the Employer met its burden in establishing that the putative supervisors possessed primary supervisory indicia to assign and to responsibly direct the work of employees. Moreover, I find that the supervisory status of the putative supervisors is bolstered by the presence of secondary indicia. Below is a discussion of the evidence presented at hearing

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[7] Evidence satisfies the preponderance standard if the fact finder concludes that "the existence of the contested fact is more probable than its nonexistence." McCormick, Evidence Section 339 (7th Ed. 2013).

[8] The parties stipulated in the underlying pre-election hearing that the putative supervisors could not hire. Further, in the current hearing, no evidence was presented to establish that the putative supervisors could suspend, lay off, recall, promote, or discharge employees.

regarding the primary indicia of supervisory status, including the authority to discipline, assign, and reward, and the secondary indicia present in the case.

A. Discipline

1. Facts

Each of the four putative supervisors testified regarding their experience with the issuance of warnings to employees. At the pre-election hearing, Lal testified that he had issued discipline to employees. In this regard, Lal testified that Jang gave him blank warning forms and directed that he issue a warning to employees who did not follow safety procedures or meet work requirements. Lal testified that at Jang's direction, he issued warnings to employees Christopher Quinoes and Gerron Smart. Although Jang observed Quinoes' failure to wear safety equipment and directed Lal to issue the warning, there is no evidence that Jang had any involvement in the issuance of the discipline to Smart. After observing Smart's failure to comply with the safety rules, Lal issued the warning to Smart; however, Lal testified that he did so out of fear that Jang would be mad if he did not do so. Lal testified, at the pre-election hearing, that he made the decision to issue a "first warning" to both employees because this was their first offense.

At the post-election hearing, Sanchez testified that in January, he gave a written warning to three employees for disobeying an order to check the work product. The Employer did not produce any evidence surrounding the details or the circumstances giving rise to the warnings and did not introduce copies of the warnings into the record. Sanchez testified that he and Lal, who works in the Extrusion Department on the 12-hour shift opposite Sanchez, have the authority to discipline employees without permission from the production managers and to recommend discipline to managers.

Martinez and Torres testified that they merely delivered warnings prepared by Jang and Kang to employees. In this regard, Martinez, who denies that he has the authority to issue discipline, testified that Jang gave him a warning and directed him to issue the warning to Jose Allende for failing to wear a safety mask. Martinez asserts that he did not want to issue the warning and that he only issued the warning after Jang directed him to do so a second time. Nonetheless, a copy of the warning contains Martinez's signature. Employees Ignacio Munoz Bamaca[9] and James Hammond testified that they saw Martinez issue the warning to Allende.

Similarly, Torres testified that Kang filled out a warning and directed Torres to give the warning to an employee. However, Torres testified that if he saw an employee without the required safety glasses, he would direct the employee to wear the glasses. Notably, Torres testified that, although it has never occurred, he (Torres) would be held accountable if an employee is injured on the job for not wearing their safety glasses or gloves.

In a separate incident, Martinez advised an employee named Ronnie that he was going to lay him off for a week because of a production error that resulted in the wrong color of product being produced. After Ronnie told Martinez to "go call the Korean so that he could lay him off," nothing further occurred and Ronnie did not serve a suspension. Bamaca testified that he was a member of Ronnie's group when the incident occurred, and that following the production error, Martinez advised Bamaca to be more careful.

2. Analysis

In determining whether an employee possesses the requisite authority to issue discipline, the Board will examine whether the employee used independent judgment to issue the discipline. In *Oakwood*, the Board stated, "judgment is not independent if it is dictated or controlled by

[9] Ignacio Munoz Bamaca testified that he is an operator helper in the Recycling Department. As such, he drives a forklift and pulls material for the orders and moves the material to a refinery.

detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Oakwood* at 693. The evidence presented by the Employer fails to establish that the employees exercised the use of independent judgment when issuing discipline. In this regard, Lal, Martinez, and Torres testified that they merely delivered warnings previously prepared by Jang. The record establishes that Jang gave the employees specific instructions to issue warnings if employees failed to wear the appropriate safety gear or meet work requirements. There is no evidence to establish that the purported authority extends beyond Jang's specific directions. In this regard, when Martinez attempted to suspend Ronnie for producing the wrong color product, Ronnie challenged his authority, and Martinez did not attempt to follow through with the suspension. See *NLRB v. Dole Fresh Vegetables, Inc.* 334 F.3d 478, 486 (2003). (Employees who merely carried out the direction of a manager to fill out and sign a warning notice are not supervisors within the meaning of the Act). With regard to the warnings issued by Sanchez, as noted above, the record fails to establish any details or circumstances explaining when or how the warnings were issued, or even who made the decision to issue the warnings.

In addition to the lack of detail surrounding the circumstances in which putative supervisor Sanchez allegedly issued discipline to employees, and the involvement of the production managers in each discipline proffered, there is no evidence regarding the impact, if any, of the warnings on the job status or tenure of employees. At the pre-election hearing, Jang testified that after a warning is issued a copy is given to management. Jang further testified that while there is "something like..." a progressive disciplinary system, he does not know about a written progressive disciplinary policy. In the post election hearing, Sanchez testified that if an employee is written up too much, he will talk it over with his supervisor and "from what he

knows" employees can lose their job if they are written up too much. Sanchez further testified, "when you first give a warning to someone, you need to speak to that individual, and if they do it twice, then you give them a warning, and if they don't understand two or three times, then you give them that warning. In *Direct TV*, 357 NLRB No. 149 slip op at 4 (2011), the Board held that "the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority." As in *Direct TV*, the Employer did not introduce evidence establishing the existence of a progressive disciplinary system or otherwise explain how the warnings would be used in future disciplinary action.

If no "single specific instance in which [the supervisor] had used discretion or independent judgment regarding discipline" can be found, then supervisory status cannot be established with regard to that primary indicia. *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012). Accordingly, the Employer has failed to meet its burden of establishing that the putative supervisors exercised the authority to issue discipline to employees using independent judgment.

B. Assign

1. Facts

The Employer asserts that the putative supervisors possess the authority to make work assignments, to grant days off, and to assign overtime. In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2001), the Board defined the assignment of work as "the act of designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks to an employee" The Board further clarified that to assign relates to direction of significant overall duties, not to ad hoc instructions to the employee to perform a discrete task. *Id.* at 689. The

Board notes that, "[t]he authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the "routine or clerical." *Id.* at 693. As explained below, the evidence establishes that the putative supervisor performed their jobs using their independent judgment to assign employees to significant overall duties to keep the production process moving, to grant days off, and to assign overtime.

a. Work Assignments

Production employees, who work 12-hour rotating day and night shifts, report to work in accordance with a posted schedule. The schedule, which is initially prepared by Jang, is periodically modified by Sanchez and Lal. Employees work in groups of 3-5 employees, with one employee per group being designated as a leader based upon the employee's experience and ability to operate the machines.[10] At the beginning of each shift, the production managers provide Sanchez, Lal, Martinez, and Torres with a production list of orders and materials. Sanchez, Lal, Martinez, and Torres make job assignment to employees and the employees then operate the machines to produce the product. Employees testified that although they check in with the putative supervisor at the beginning of their shift to obtain a job assignment, they know what they need to do to perform their jobs due to the repetitious nature of the work. Throughout the shift, the putative supervisors, who also work 12- hour rotating shifts but who do not have assigned lines/machines, move throughout the facility, and communicate with the group leads and individual employees to ensure that sufficient material is on the line, and that the quality and color of the fibers being produced are correct. If employees have problems with production, quality, or the operation of the machines, they contact one of the putative supervisors. The

[10] The lead employees are in the unit.

putative supervisor then decides whether to repair the machine, to notify maintenance of the need for repair, or to temporarily move employees to a different machine or building to perform the same work or other tasks such as cleaning. The employees have no contact with Jang or Kang throughout the shift .

b. The Authority to Grant Time Off/ Permission to Leave Work Early

Employees who want a day off, or who need to leave work early contact the putative supervisor in their area and make their request. In most instances, the putative supervisor will tell the employee they can have the time off or leave work. The putative supervisor will then work in place of the absent employee or will make arrangements for a replacement by shifting employees amongst the machines. Although there was some discrepancy in the testimony regarding whether the putative supervisors contacted their respective production managers, Jang or Kang, before granting the employees' request, at some point, the putative supervisor notifies the production manager, and either Jang or Kang provide approval. In this regard, Lal testified that if an employee is absent, Jang would decide whether to call in a replacement, but Lal would decide which employee to call because he (Lal) would know which groups of employees were not working.

Lal and Torres testified that if an employee wants to go home early, they always consult their production manager before giving the employee permission to leave. However, Lal testified that in Jang's absence, he could give an employee permission to go home early in cases of emergency. I note however that there appears to be a substantial amount of time when Jang is absent because Jang works 10 hour days on day shift and Lal works 12-hour rotating day and night shifts. Martinez initially testified that he always consults Jang prior to an employee leaving early but later acknowledged that, on occasion, he may tell an employee they can go home early

and tell Jang later. Employee witnesses testified that the putative supervisor would tell them on the spot, without prior consultation with Jang or Kang, that their request to leave work early or to take a day off is granted.

c. Assignment of Overtime

Overtime hours are available to employees when there is a need for increased production. Sanchez testified that he has authority to decide if an employee can work overtime but that he always checks with Jang first. Martinez and Torres testified that if they need an employee to work overtime, they also check with Jang before calling an employee. Employees can voluntarily advise one of the four putative supervisors of their desire to work overtime or they may be contacted by one of the putative supervisors or their group's leader and asked if they wish to work overtime. In addition, Martinez testified that he speaks to the employees when they are working and asks them who is open to coming into work.

As noted above, the groups work rotating shifts so on any given day, there are always groups that are working, and groups that are off on any given day. To call an employee to work, the putative supervisors make contact with an employee who is not working, or contact the group lead who will call employees in his group to locate an employee who wants to work. The putative supervisors acknowledge that they know which employees/groups want to work overtime and those who do not desire to work overtime. However, there is no evidence that the putative supervisors mandate or have the authority to mandate that any particular employee work overtime.

2. Analysis

The record establishes that the putative supervisors are first-line supervisors who assign employees to a machine at the beginning of the shift and who use independent judgment to move

employees as necessary throughout the shift depending upon the problems that arise. The authority of the supervisors to direct the work of the employees, to grant days off, and to assign employees to work overtime, has a substantial impact on the daily work lives of employees. See *SNE Enterprises, Inc.* 348 NLRB 1041 (2006) (Lead employees found to be first-line supervisors who assign and direct the work of unit employees on a daily basis.) Although the Board will not find sufficient use of independent judgment in assigning work when the assignment is routine or merely clerical in nature, the duties of the putative supervisors reflect that the assignment, by necessity, requires the use of independent judgment. In this regard, for instance, Martinez testified that he works with the employees to ensure that the machines are operable and the product is being produced. When a machine malfunctions, Martinez must decide whether he will repair the machine or call maintenance. In addition, he has to decide when and to where he will move employees, i.e. whether to move employees to other machines or whether to direct the employees to other tasks. Similarly, Torres testified that when an employee has a problem, he will assist the employee in correcting the problem. There is no evidence that the Employer has any set procedure or guidelines that the putative supervisors follow when making these decisions. See *Keeler Brass*, 301 NLRB 769, 781 (1991)(Independent judgment found where employee is involved in passing out work assignments and solving routine problems where there is no set procedure or manual detailing how to deal with problems.)

Accordingly, the evidence establishes that the putative supervisors assign work and exercise independent judgment in doing so.

C. Reward/Grant of Pay Raises

1. Facts

The Employer asserts that the putative supervisors have meaningful input into the decision of the Employer to grant employees a pay raise. The record establishes that at Jang's direction, Sanchez and Martinez obtained a list of employees in their respective areas and went throughout the facility asking employees their rate of pay and hire date. After completing the lists, Sanchez and Martinez returned the lists to Jang. Jang testified in the pre-election hearing that upon receipt of the list from the putative supervisors, he made changes and submitted the list to Oh, who had the final say regarding raises. Although Sanchez testified that he has recommended to the Employer that the Employer grant employees raises based upon the responsibilities of the employees, the jobs they perform, the security (safety) of the job, and how much the employees give of themselves, he failed to provide the circumstances surrounding his recommendations or the names of the employees for whom he recommended a raise. At the pre election hearing, the Employer introduced a list that was prepared by Sanchez in which he recommended raises for employees. However, the document and associated testimony reflect that Sanchez recommended that all but new employees receive a fifty-cent raise. In the current, Torres testified that he does not know how much each employee makes; does not decide to give raises; does not recommend raises; and does not know the process for employees to receive a raise.

2. Analysis

As in the pre-election hearing, no evidence was presented by the Employer in the post-election hearing of the previous year's recommendations for raises, which raises were effectuated, and the reasons for denying those recommendations. An individual's

recommendation to reward employees, including a recommendation of raises, can suggest supervisory status, depending upon the effectiveness of the recommendation. *Harvey's Resort Hotel*, 271 NLRB 306, 311 (1984). However, the record fails to establish that the putative supervisors exercised independent judgment in making recommendations for raises, or that any such recommendations were adopted by the Employer. When evidence is inconclusive on a particular indicia of supervisory authority, the Board will find that supervisory status has not been established based on those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *The Door*, 297 NLRB 601 fn 5 (1990).

D. Secondary Indicia

The Board has consistently held that secondary indicia of supervisory status is not dispositive without evidence of at least one primary indicator of supervisory status. See e.g., *Billows Elec. Supply of Northfield, Inc.*, 311 NLRB 878 fn.2 (1993): *Juniper Indus., Inc.*, 311 NLRB 109, 110 (1993). The secondary indicia in the current case strongly supports a finding that the putative supervisors are supervisor within the meaning of the Act. These indicia include the disparity in the supervisor to employee ratio, the perception of employees that the four putative supervisors are supervisors, and the higher hourly wage rate paid to the putative supervisors. I will discuss each of the secondary indicia below.

First, with regard to the supervisor to employee ratio, if the four employees are not supervisors, the ratio is extremely high in that there are approximately 137 employees and only 2 production managers to cover a facility that covers four buildings and 500,000- 600,000 square feet. In addition, although employees testified that the work is repetitious and routine and they know how to perform their jobs, they acknowledge that when a machine breaks down, they need

to leave early, they want a day off, or they desire to work overtime, they go directly to one of the putative supervisors.

Second, employees testified that they perceive the four employees as their supervisor and the persons who give the work assignments, grant time off, grant overtime, and are available throughout the work shift to address production problems. In addition, the record establishes that even through Jang and Kang are on the work floor frequently, they have little, if any interaction with employees. Although this may be due in part to the fact that the employees speak either English or Spanish and Jang and Kang speak only Korean. Nonetheless, the putative supervisors who speak only Spanish, communicate with Jang and Kang, using gestures and signs, common words that they both understand, and translation via telephone.

Finally, the putative supervisors make about $1.00 per hour more than production employees, are not assigned to work on a regular line but instead move throughout the Employer's four buildings observing the work of the unit employees.

E. Conclusion

Based on the foregoing, the record establishes that the putative supervisors possess the primary indicia of supervisory status of using independent judgment to assign work and that the secondary indicia lends support to this finding. Accordingly, the putative supervisors are supervisors under Section 2(11) of the Act.

IV. Objectionable conduct

The Employer asserts in its objections that the putative supervisors engaged in conduct that coerced and interfered with employees' freedom of choice in the election. Below is a summary of the applicable legal standard adopted by the Board in *Harborside Healthcare*, 343 NLRB 906 (2004) for analyzing prounion conduct of supervisors, a discussion of the evidence in

support of the objections, and an analysis of the facts under the *Harborside* standard. More specifically, in accordance with the analysis set forth below, I recommend that Objections 1, 2, 3, 4, 6, 10, 11, and 12 be sustained. I further recommend that Objections 7, 8, 9, and 13, be overruled because no evidence was proffered in support of these objections. [11]

A. Applicable Standard

In an objections case, the burden is on the objecting party to prove its case. *Progress Industries*, 285 NLRB 694, 700 (1987). This involves demonstrating that the alleged objectionable conduct interfered with the free choice of employees to such a degree that it materially affected the results of the election. In *Harborside Healthcare, Inc.,* 343 NLRB 906, 906 (2004), the Board established a two-factor test for determining whether to set aside an election based upon the prounion conduct of supervisors:

> 1. Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employee's exercise of free choice in the election, including (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct and (b) an examination of the nature, extent, and context of the conduct in question.
>
> 2. Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

[11] With regard to Objection 7, 8, and 9, no evidence was presented to support the objections. Specifically, no evidence was presented that supervisors told employees they were crazy if they did not vote for the Union; threatened employees with physical harm if they voted for the Employer; and stated that they would be the union leaders and would fire employees who supported the Employer. With regard to Objection 13, the Employer presented no evidence that supervisors threatened to send signed authorization cards to the Employer if the Petitioner did not win the election. However, I note that on direct examination of Martinez by Union counsel, Martinez said that he heard an employee from a group comment that if the company won the union election, that the union was going to send the union cards to the company so they would fire the people who signed the cards. There is no evidence as to who made the remark or that Martinez disseminated or repeated the remark to anyone.

In assessing whether prounion conduct by a supervisor amounts to objectionable conduct, the Board looks to the nature and degree of the supervisory authority, and the nature, extent and context of the supervisor's conduct. *Harborside* 343 NLRB at 910. The Board then examines whether the conduct materially affected the election outcome.

B. Objection 1

1. Facts

The Employer alleges in Objection 1 that putative supervisors engaged in conduct that coerced and interfered with employee's free choice in the election by soliciting employees to sign union authorization cards. The Employer presented evidence concerning two instances of solicitation by putative supervisor Lal. First, Carlos Vicente[12] testified that he saw Lal give cards to two employees at work. The solicitation occurred in Building 3 and Vicente was about five to six feet away from the where the employees and Lal were sitting at their machines. At the time, Vicente, who was working at his machine, was checking material that fell from the machine. He did not hear what Lal and the employees said to each other. The date of the solicitation was not established, and neither of the two employees testified regarding the solicitation.[13]

Second, employee Jose Perez[14] testified that Lal "slipped" him a union card in the break room and told him to complete the card. Lal also stated to Perez that the union was going to make a lot of changes within the company. Although there were many employees in the break

[12] Carlos Vincente testified that he is a supervisor's helper in the Extrusion department.
[13] In *Harborside*, the Board noted that it would consider pre-critical period misconduct relating to the solicitation of cards.
[14] Jose Perez testified that his current position is a machine operator in the Finishing Department.

room at the time, there is no evidence that any other employees saw Lal "slip" the card to Perez or heard Lal's statement to Perez. The Employer did not present Lal to testify to this matter and the date of the event was not established.

In addition to the solicitation of the two employees noted above, Carolos Vicente testified that before the petition was filed, he saw Lal talking to a couple of co-workers and he approached where they were talking. He heard Lal mention that if the employees did not sign the union form, it was going to make it a lot easier for the company to be able to let employees go. Vicente did not identify the two employees and provided no other details.

2. Analysis

With regard to the solicitation of union authorization cards, the Board stated that "absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not." *Id.* at 911. In *Harborside*, the Board found that the immediate supervisor of employees had significant authority over employees, including the ability to both reward and retaliate against them, because the supervisor possessed the authority to initiate discipline, direct and assign nurses' schedules, provide the principal input on evaluations, suspend employees, and recommend suspension and termination of employees. The Board concluded that the nature and degree of this authority supported a finding that the supervisor's prounion conduct, "reasonably tended to coerce or interfere with employees' exercise of free choice in the election." *Id.* at 910. The Board next examined the nature, extent, and context of the supervisor's conduct and concluded that the conduct reasonably tended to coerce and interfere with employees' free choice. *Id.* at 910-911. This conduct included soliciting authorization cards from a dozen employees, making repeated threats of job loss, mandating that employees attend union meetings, pressuring employees to

wear union insignia, badgering employees to vote for the union, and soliciting signatures on a union petition. *Id.* at 910-911. Finally, the Board examined whether the supervisor's conduct materially affected the election outcome. In this regard, the Board looked at the margin of the election, the timing of the conduct and the lingering effect of the conduct. *Id.* at 913.

a. ***Nature and Degree of Supervisory Status***

In examining the nature and degree of the supervisory authority of the putative supervisors in the current case, it is apparent that they were the first line of supervision with whom employees communicated on a daily basis. In this regard, Extrusion and Recycling Department employees testified that they had no contact with Jang. The putative supervisors assigned and directed the daily work of the employees, and employees perceived the putative supervisors as their supervisor and consulted them for all things related to the performance of the job. In *Madison Square Garden*, 350 NLRB 117, 121 (2007), Board found that the first line supervisors who have the most day-today- contact with the employees can broadly impact employees' daily working lives. As set forth above, the putative supervisors had significant control over the day-to-day work life of the employees. Thus, the record establishes that the nature and degree of authority held by the putative supervisors supports a finding that their prounion conduct as described below "reasonably tended to coerce or interfere with employees' exercise of free choice in the election." *Harborside* 343 at 910.

b. Nature, Extent, and Context of Prounion Activity

The record establishes that Lal solicited employees to sign authorization cards. In this regard, Lal did not testify in the post election hearing and thus did not deny the solicitation or that he told employees that if they did not sign the cards it would make it easier for the employer to discharge them. In *Harborside*, the Board states, "when a supervisor asks that a card be signed, the employee will reasonably be concerned that the "right" response will be viewed with favor, and a

"wrong" response with disfavor." *Harborside* at 911. In addition to Lal's solicitation activities, the record established that he attended union meetings where he addressed employees concerning the Employer failure to pay the correct benefits, and Jang's ill treatment of employees.

Although the Board indicates that the effect of the prounion conduct can be mitigated by the Employer's response by either disavowing the conduct or in the manner in which it conducts is antiunion campaign, the parties presented no evidence relating to these matters. See *Millard Refrigerated Services, Inc.,* 345 NLRB 1144, 1145(2005) (Given the broad authority that the involved supervisors had over the solicited employees, and in the absence of mitigating circumstances, the supervisor's card solicitation is objectionable.) Absent mitigating circumstances, Lal's prounion conduct had a reasonable tendency to coerce and interfere with employees' freedom of choice in the election.

c. Did Prounion Conduct Materially Affected the Election Outcome.

After finding that a supervisor's prounion conduct had a reasonable tendency to coerce and interfere with employees' freedom of choice in an election, the Board moves to prong two of the *Harborside* test. This examination includes an analysis of the margin of victory, the timing of the conduct, and the lingering effects. With regard to the margin of victory, the record establishes that the Union won the election by twelve votes with seven challenged ballots Following the Board's direction in *Harborside* to view the facts in the light most favorable to the objecting party, i.e., the Employer, and assuming that the challenged ballots were cast against the Union, the margin is reduced to a spread of five votes. See *Harborside* 343 at 913. The record established that Lal directly solicited three employees to sign cards and that he spoke to at least two others regarding authorization cards. A shift in these five votes could have changed the election results. With regard to the timing of the conduct and lingering effects, other than establishing that Lal's direct solicitation of authorization cards occurred after the filing of the

petition and prior to the election, and that his conversation with other employees urging them to sign a card occurred pre-petition, the record fails to establish the dates of Lal's prounion conduct. However, as discussed below, the record establishes that as recently as the day of the election, Martinez continued to engage in prounion conduct by advising employees as they walked to the polls, to "think well" about their votes. Thus, the record establishes that Lal's prounion conduct had a reasonable tendency to coerce and interfere with employees' freedom of choice the election. I recommend that this objection be sustained.

C. Objections 2, 3, 4, and 10

1. Facts

In Objection 2, the Employer asserts that Martinez threatened employees with discipline/discharge if they voted for the Employer and/or if they exercised their right to participate in the election. Employee James Hammond[15] testified on direct examination that in a one-on-one conversation with putative supervisor Martinez, following the pre-election hearing, Martinez said that if the union wins, then someone would probably be fired. Later, Hammond modified his testimony in response to a question from the hearing officer, and stated that Martinez said, "If the Union wins, that maybe the people for the plant could be fired." Martinez denies that he made the alleged statements. Wilfredo Gonzalez[16], testified that Martinez said that the Union was best for all and that if employees did not vote for the Union the Company would let the employees go.

In Objection 3, the Employer asserts that Lal, Martinez, and Torres attended and spoke on behalf of Petitioner at union meetings and specifically raised the Employer's wages/benefits in an effort to influence employees' votes. In this regard, Carlos Vicente, Wilfredo Gonzalez and Edwin Vicente, testified that they attended union meetings with as many as twenty

[15] Hammond is a machine operator in the Recycling Department.
[16] Wilfredo Gonzalez testified that he is a helper to his coworkers in the Recycling Department.

employees, including, at times, Sanchez, Lal, Martinez, and Torres. Although the employees could not specify the dates of the meetings or distinguish in which meetings certain alleged statements were made, Vicente testified that in one meeting he heard Lal state that the company was not paying out the benefits that they were supposed to pay. Gonzalez testified that in one meeting, he heard Lal ask employees questions.[17] In one meeting, Lal sat at the front of the room, addressed the employees, and told them to vote for the union. Sanchez testified that he also attended one union meeting, and in that meeting, Lal addressed employees and talked about how badly Jang treats employees.

Wilfredo Gonzalez testified that during the union meetings he heard Martinez ask employees questions, and state that there have been many changes and that employees needed to vote for the Union. Gonzalez did not specify the nature of the questions asked by Martinez. Martinez, who admits that he attended two union meetings, testified that his only comment during the two meetings he attended was "[w]ell, at least they are not yelling at us."

Although no employees testified regarding Torres' attendance at union meetings, Torres admits that he attended five union meetings and that he asked questions about the benefits of a union. Torres admits that at one of the meetings he received union tee shirts and a hat. Subsequently, he wore the clothing to work, and he appeared in a photograph in a union publication wearing the Union shirt.

In Objection 4, the Employer asserts that Lal and Martinez made representations about Employer wages and benefits in an effort to influence employees' votes in the election. In support of this objection, the Employer presented employees Carlos Vicente, Ignacio Munoz Bamaca, and Jose

[17] The record fails to establish what questions were asked.

Garcia[18] . Vicente testified that at one of the Union meetings, he heard Lal state that the company was not paying out the benefits that they were supposed to pay. Ignacio Munoz Bamaca and Jose Garcia testified that on one occasion during a break in the break room, employees discussed the union. Bamaca asserts that he heard Martinez say that the union was a good option for all, that employees would receive better pay and treatment, and that employees should be behind the union. Garcia recalls Martinez saying that if the union comes in, it will be better and employees may be making more money.

In Objection 10, the Employer asserts that supervisors and/or third parties told employees to "think hard" before voting for the Employer while the employees were on a "line of march" to the polling place to vote. Employee Ignacio Munoz Bamaca testified that on the day of the election, as he and about seven of his coworkers, including Martinez, were walking to the polls, Martinez told the employees to "think well." Bamaca asserts that Martinez "gave them to understand" that if they voted for the company, things were going to go bad and if employees supported the company, there could be a possibility of the Employer letting them go. Notably, Bamaca did not testify that he heard Martinez make these statements, just that Martinez "gave them to understand." Employee Wilfredo Gonzalez testified that the statement that he heard Martinez make as the employees were proceeding to the voting area was that employees should think well about their votes. Gonzalez asserts that Martinez said that employees have to vote yes.

*2. **Analysis***

In *Harborside*, the Board stated that "the issue of whether to set aside an election based on the acts or statements of supervisors is one that may arise whether the conduct is prounion or antiunion" *Harborside*, 343 at 907. In assessing the prounion conduct and extent of a supervisor's actions, "the proper inquiry ...is whether supervisory prounion conduct 'reasonably tend[s] to have a

[18] Jose Garcia is a machine operator in the Recycling Department.

coercive effect on or [is] likely to impair' an employees' choice." *Harborside* at 909 quoting *NLRB v. Hawaiian Flour Mill,* 792 F.2d 1459, 1462 (1986). An examination of the nature, extent, and context of the prounion conduct as alleged in Objections 2, 3, 4, and 10 establishes that the conduct had a reasonable tendency to coerce and interfere with employees' freedom of choice in the election.

First, as noted above, the record establishes that the nature and extent of the supervisory status of the putative supervisors supports a finding that their prounion conduct "reasonably tended to coerce or interfere with employees' exercise of free choice." *Harborside*, 343 at 910. Next, in examining the nature, extent, and context of the prounion conduct, the record established that Martinez made statements to employees directly under their supervision encouraging employees to support the Union, threatening that there could be discharges, and advising employees that the Union was a good option for all and that employees would receive better pay and treatment. In addition, Martinez continued to campaign on behalf of the Petitioner up to the day of the election and advised employees to "think well" about their votes as they walked to the polls. See *Millard Refrigerated Services, Inc.*, 345 NLRB 1143, 1144 (2005) (Supervisor made alleged threat by telling employees to "Either vote for the union or I'll make your life a living hell.") With regard to this comment, Martinez was in the presence of seven employees. Bamaca testified that Martinez "gave them to understand" that if the employees voted for the company, things were going to go bad and there could be a possibility of the Employer letting them go. Wilfredo Gonzalez testified that on the way to the polls Martinez told employees to "think well" and that employees had to vote yes. Although Martinez denies these statements, I find that his testimony is not credible. In this regard, when being questioned about his authority within the plant, he became defensive, and at times during his testimony, he stood and appeared to argue with the Employer's officials who were present in the hearing room. Moreover, many of his responses to questions on direct and cross were evasive and he failed to answer the question.

In addition to the statements made by Martinez and Lal, Lal, Martinez, and Torres admit that they attended union meetings. Lal spoke to employees at the meetings regarding Jang's mistreatment of employees and the Employer's failure to pay the correct benefits. The record further establishes that Torres openly supported the Union, attended five union meetings and appeared in union publication.

The prevalence of prounion conduct of the putative supervisors throughout the campaign and up to the date of the election, including the threats of discharge and the promise of better benefits supports a finding that the conduct materially affected the election outcome. Accordingly, I recommend that Objections 2, 3, 4, and 10 be sustained.

D. Objection 6

1. Facts

In Objection 6, the Employer alleges that supervisors and/or third parties asked employees who they intended to vote for in a threatening and intimidating manner. In support of this objection, James Hammond testified that after he testified at the pre-election hearing, Martinez, in a one-on-one conversation, asked Hammond if he was voting for the Union or the plant. Hammond replied that he was a grown man and he did not answer Martinez's question.

2. Analysis

In examining whether interrogation of an employee amounts to objectionable conduct, the test is whether, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom. *Hotel Employees and Restaurant Employees Union Local* 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985). In the current case, the conversation between Hammond and Martinez occurred after Hammond testified at the underlying pre-election hearing on behalf of

the Employer. There is no testimony regarding the context of the conversation between the two, or how the conversation arose. In addition, Hammond's response to Martinez reveals that he was not intimidated by the questions. In the totality of the circumstances, the alleged interrogation does not amount to objectionable conduct and I recommend that Objection 6 should be overruled.

E. Objection 11

The Employer asserts in this objection that supervisors and/or third parties exercised their supervisory responsibilities and assigned new/different duties to employees because they did not support the Petitioner. In support of the objection, Jose Garcia, a machine operator in the Recycling Department, testified that before the election, on one occasion, Martinez moved him from the machine to the grinder. The grinder position is more difficult than operating a machine and is unpopular with employees because it is dirty, requires the use of force, and lifting heavy rocks. Garcia asserts that usually, he only works on the grinder when he works overtime and that as a machine operator he is never moved to the grinder. Contrary to Garcia's assertion, Wilfredo Gonzalez confirmed that all employees working on Martinez's shift rotate to the grinder position.

The record fails to establish that Martinez engaged in objectionable conduct by moving Garcia to perform the grinder duties. Although Garcia asserts that Martinez made the assignment because Garcia did not support the union, the record fails to establish any nexus between the job assignment and Garcia's support for the Employer. Importantly, the evidence established that all recycling group employees are rotated to work on the grinder. As the record fails to establish that Martinez moved Garcia to the grinder or changed his job duties because Garcia did not support the Union, I recommend that Objection 11 be overruled.

F. Objection 12

1. Facts

The Employer asserts in Objection 12, that putative supervisor Torres engaged in objectionable conduct by admitting that he was a supervisor to the Board Agent conducting the

election. Carlos Vicente who served as an observer for the Employer at the election testified that he challenged the vote of putative supervisor Torres. Vicente testified that when the Board agent conducting the election asked Torres what he did, Torres replied that he supervised Lines 1, 3, 4 and 5. Torres denies that this conduct occurred.

2. Analysis

Torres' alleged statement to the Board Agent during the challenge process of the election does not amount to objectionable conduct. When examining whether an employee is a supervisor, the Board looks to the actual duties of the employee, not to the job title. See *Keeler Brass* at 780. Accordingly, I recommend that Objection 12 be overruled.

G. Objection 14

In its final objection, Objection 14, the Employer asserts that the Petitioner, through and by its agents, officers, and representatives acting on its behalf or with its implied endorsement destroyed the necessary laboratory conditions by having knowledge of and acquiescing in pro-union conduct by supervisors as defined by Section 2(11) of the Act. In support of this objection, the Employer relies upon the evidence submitted in support of its other objections. As noted above, I have recommended that certain of the employer's objections be sustained. As no additional evidence was presented in support of this specific objection, I recommend that the objection be overruled.

V. Conclusion:

The record establishes that the four putative supervisors possess both primary and secondary indicia of supervisory authority. The record further establishes that the putative supervisors engaged in continuous, pervasive, and aggressive campaigning up to the date of the election. After applying the *Harborside* two-part test to the facts here, I recommend that the Regional Director sustain Objections 1, 2, 3, 4, and 10 and order that a second election be held.

Right to File Exceptions: Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Regional Director, Region 10.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111-102.114, concerning the Service and Filing of Papers, exceptions must be received by the Regional Director, Region 10 by close of business on August 9, 2013, at 4:30 p.m. E.T., unless electronically filed. Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically. If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. in the time zone of the receiving office on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Regional Director may grant special permission for a longer period within which to file.[19] A copy of the exceptions must be served on each of the other parties to the proceeding in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gove tab, click on E-Filing, and follow the detailed instructions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's

[19] A request for extension of time, which may also be filed electronically, should be submitted to the Regional Director and a copy of such request for extension of time should be provided to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on each of the other parties in the proceeding in the same manner or a faster manner as that utilized in filing the request with the Regional Director.

website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Winston-Salem, North Carolina, this 26th day of July 2013.

Rosetta B. Lane

Rosetta B. Lane, Hearing Officer
National Labor Relations Board
Region 10, Subregion 11
4035 University Pkwy. Suite 200
Winston-Salem, North Carolina 27106

Certificate of Service

I hereby certify that copies of the foregoing Hearing Officer's Report on Objections and Recommendations to the Regional Director have this date been served by ordinary mail upon the following parties:

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Dated at Winston-Salem, North Carolina, this 26th day of July 2013.

Rosetta B. Lane

Rosetta B. Lane, Hearing Officer

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

EMPLOYER'S OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

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June 6, 2013

Appendix A

I. INTRODUCTION

Pursuant to Section 102.69(a) of the Board's Rules and Regulations, the Employer Pac Tell Group, Inc. d/b/a U.S. Fibers, by and through the undersigned counsel, hereby files these objections to conduct affecting the results of the election held May 29-30, 2013,[1] at the Employer's Trenton, South Carolina facility.

II. PRELIMINARY STATEMENT

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 ("the Union"), filed a petition on March 26 seeking to represent "all production, janitorial, warehousemen, shipping, and maintenance workers at the Trenton, South Carolina plant, but excluding all managers and supervisors as defined under the Act." The Employer challenged the Union's attempt to carve out the Trenton facility of its South Carolina operations and sought to add its facility at 1100 Church Street, Laurens, South Carolina, to any bargaining unit. The Employer also sought to exclude from the unit four individuals, Eduardo Sanchez, Aduaco Torres, Jose Lal, and David Martinez, on the grounds that they are "supervisors" as defined by Section 2(11) of the Act.

A hearing was held in Aiken, South Carolina, on April 18. On May 3, the Acting Regional Director issued a Decision and Direction of Election rejecting the Employer's arguments concerning the scope and composition of the unit and directing an election in the petitioned-for unit. On May 16, the Employer filed a request for review of the Acting Regional Director's decision to exclude the putative supervisors from the unit.

An election was held on May 29-30. The tally of ballots showed 71 votes for and 59 against the Union, with 7 challenged ballots.

[1]All dates referenced herein are to 2013, unless otherwise indicated.

On May 31, the Board issued an order stating that the Employer's request for review "raises a substantial issue with respect to the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres," but concluding that the issue "may best be resolved through the use of the Board's challenge procedure." Consequently, the Board denied the Employer's request for review.

III. OBJECTIONS

Objection 1

During the critical period, supervisors and/or third parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by soliciting union authorization cards from employees.

Objection 2

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by threatening employees with discipline/discharge if they voted for the Company and/or if they exercised their right to participate in the election.

Objection 3

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by attending and speaking on behalf of the Union at Union meetings.

Objection 4

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions

by making misrepresentations about Company wages/benefits in an effort to influence employees' votes in the election.

Objection 5

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by making references to where employees live in a threatening and intimidating manner.

Objection 6

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by asking employees who they intend to vote for in a threatening and intimidating manner.

Objection 7

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by telling employees they are "crazy' if they vote for the Company.

Objection 8

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by threatening and/or implying physical harm to employees who vote for the Company.

Objection 9

During the critical period, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by telling employees they (the supervisors) will be union leaders and would fire those supporting the Company.

Objection 10

On the day of the election, supervisors and/or third-parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by telling employees to "think hard" before voting for the Company while said employees were on a "line of march" to the polling place to vote.

Objection 11

During the critical period, supervisors and/or third parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by exercising their supervisory responsibilities and assigning new/different duties to employees because they did not support the Union.

Objection 12

On the day of the election, a supervisor and/or a third-party coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by admitting at the polling location that he was a supervisor when questioned about his job duties by the Board agent.

Objection 13

During the critical period, supervisors and/or third parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by threatening employees that the Union would send all signed authorization cards to the Employer if the Union did not win the election.

Objection 14

The Union, by and through its agents, officers, and representatives acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and

destroyed the necessary laboratory conditions by having knowledge of and acquiescing in pro-union conduct by supervisors as defined by Section 2(11) of the Act, including the threats, coercion, and intimidation tactics described in the above objections.

Objection 15

The Union, by and through its agents, officers, and representatives acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by campaigning in such a way as to inflame racial and/or ethnic prejudice of employees, deliberately seeking to overemphasize and exacerbate racial and/or ethnic feelings by irrelevant, inflammatory appeals.

Objection 16

The Union, by and through its agents, officers, and representatives acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by harassing and coercing employees who expressed opposition to the Union and/or who were selected to act as observers during the election.

IV. CONCLUSION

In light of the above-described objectionable conduct, the Employer requests that the petition be dismissed or, in the alternative, that the election held on May 29-30 be set aside and a re-run election be held in an environment free from Union, third-party, and/or supervisor coercion and intimidation. In the alternative, the Employer requests, pursuant to Section 102.69(d) of the Board's Rules and Regulations, that an evidentiary hearing be directed and held on the issues raised herein, including whether Sanchez, Torres, Lal, and Martinez are supervisors

under the Act given the Board's determination that "substantial issues" on the issue exist and in light of new evidence surrounding these individuals' job duties.

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June 6, 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and

Case 10-RC-101166

UNITED STEEL, PAPER, AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Petitioner

REPORT ON OBJECTIONS
AND
NOTICE OF HEARING

Pursuant to a petition filed by the Petitioner on March 26, 2013,[1] and a Decision and Direction of Election issued by the Acting Regional Director on May 3, an election by secret ballot was conducted on May 29 and 30, to determine whether the Employer's unit[2] employees desired to be represented by the Petitioner for purposes of collective bargaining.

The tally of ballots made available to the parties at the conclusion of the election discloses the following results:

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[1] All dates are in the year 2013 unless otherwise specified.

[2] The appropriate unit of employees set forth in the Decision and Direction of Election is: "All full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees, employed by the Employer at its Trenton, South Carolina facility, excluding all other employees, including office clerical employees, professional and confidential employees, and guards and supervisors as defined in the Act."

Approximate number of eligible voters	137
Void ballots	0
Votes cast for Union	71
Votes cast against participating labor organization	59
Challenged ballots	7
Valid votes counted plus challenged ballots	137

The challenged ballots are not sufficient in number to affect the results of the election.

On June 6, the Employer filed timely objections, copy attached as Appendix A, to conduct affecting the results of the election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the issues raised by the Objections was conducted under my direction and supervision. After considering the evidence submitted in support of the Objections, the undersigned finds that the remaining Objections[3] raise substantial and material issues which can best be resolved by the conduct of a hearing as hereafter provided.

THE OBJECTIONS[4]

Overview

In its Objections, the Employer asserts that during the critical period, supervisors and/or third parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions to hold the election by engaging in the conduct summarized individually as set forth below. The putative supervisors who are alleged to have engaged in the conduct are Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres. In

[3] Objections 5, 15, and 16 have been withdrawn and will not be considered further. The remaining objections retain their original enumeration.

[4] The Petitioner denies engaging in any objectionable conduct and asserts the Objections should be overruled in their entirety.

the Decision and Direction of Election it was concluded that the Employer had not met its burden of establishing their supervisory status as it contended during the pre-election hearing.

On May 16, the Employer filed a request for review of the determination in the Decision and Direction of Election. On May 31, the Board issued an order stating that the request for review raised a substantial issue with respect to the status of those four individuals but concluded the issue may best be resolved through the use of the Board's challenge procedure. In accordance with that determination, the Board denied the request for review. Because the ballots which were challenged during the election were not sufficient in number to affect the results of the election, the status of the four putative supervisors remains in doubt.

Inasmuch as the status of these individuals undoubtedly will impact the consideration of the merits of the Objections, I will direct that the parties submit additional evidence at the hearing which will enable the hearing officer to make recommendations[5] to me as the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres.

Objection 1

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties improperly solicited union authorization cards from employees.

In support of this Objection, the Employer submitted employee witness statements in which they state that the purported supervisors attended union meetings (no dates given) and were involved in getting support for the Petitioner. Some assert that David Martinez and Jose Lal actively spoke on behalf of the union during the meetings. It is not clear if these were the

[5] I further direct the hearing officer to take notice of the pre-election hearing transcript, and the parties' submissions on the issue in order that a complete record is available for consideration of the issue.

same meetings during which authorization cards were being solicited, but the statements imply that. None of the witnesses specifically assert that Martinez, Sanchez or Torres gave them or solicited authorization cards directly from them. However, one employee states that he saw Jose Lal give two union cards to employees at approximately 11 p.m. about a month prior to the election.

Objection 2

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties threatened employees with discipline/discharge if they voted for the Employer and/or if they exercised their right to participate in the election.

In support of this Objection, the Employer submitted the statement of an employee who states that about a week prior to the election, David Martinez stated that if the union wins, then maybe some people will no longer work here anymore, referring to the employees who supported the company. A second witness asserts that other employees he knew had heard David Martinez say he would be a union leader and would be able to fire the people who voted for the company. The witness states that a lot of co-workers were looking for jobs because those threats.

A third witness states that a few weeks prior to the election, sometime between 4 and 5 a.m., he heard Jose Lal tell a group of employees that if they did not sign union cards, that it would be very easy for him to fire employees.

Objection 3

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties attended and spoke on behalf of the Petitioner at union meetings.

In support of this Objection, the Employer submitted the statements of several employee witnesses who assert that the purported supervisors attended union meetings and that David Martinez and Jose Lal actively campaigned on behalf of the union. The Employer also asserted that Aduaco Torres wore a Steelworkers' t-shirt during the week of the election and was featured in a photograph on the Petitioner's website celebrating the union's election victory.

Objection 4

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties made representations about Employer wages/benefits in an effort to influence employees' votes in the election.

In support of this Objection, the Employer submitted a statement of an employee who states that during a union meeting Jose Lal claimed that the company did not pay full benefits to the employees.

Objections 6 and 7

In Objection 6, the Employer asserts that during the critical period, supervisors and/or third parties asked employees who they intended to vote for in a threatening and intimidating manner. In Objection 7, the Employer asserts that during the critical period, supervisors and/or third parties told employees they are crazy if the vote for the Employer.

In support of these Objections, the Employer submitted a statement of an employee who says that about a week before the election, David Martinez asked who he was voting for. He

avers that after he responded he was voting for the company, Martinez responded "you're crazy for trying to vote for the Company."

Objection 8

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties threatened and/or implied physical harm to employees who voted for the Employer.

In support of this Objection, the Employer submitted a statement of an employee who asserts that a few days before the election, an employee named Pablo told him that if he voted for the company that "you don't know what they think of you or what the guys are going to do to you."

Objection 9

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties told employees that they (the supervisors) would be union leaders and would fire those who supported the Employer.

In support of this Objection, the Employer submitted a statement of an employee who asserts that other employees he knew had heard Martinez say he would be a union leader and would be able to fire the people who voted for the company.

Objection 10

In this Objection, the Employer asserts that on the day of the election, supervisors and/or third parties told employees to "think hard" before voting for the Employer while said employees were on a "line of march" to the polling place to vote.

In support of this Objection, the Employer submitted the statement of a witness who says that on the day of the election as they were walking on their way to vote, Martinez came into a group of six employees and kept telling them that they needed to think hard before they voted for the company and told them that production manager Lang would return and that would not be good for them.

Objection 11

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties exercised their supervisory responsibilities and assigned new/different duties to employees because they did not support the Petitioner.

In support of this Objection, the Employer submitted a statement of an employee who asserts that about a week prior to the election, David Martinez assigned him to "break the rocks", an assignment he had not been given before unless he came in on overtime. The witness averred that during an earlier union meeting during which Martinez was talking on behalf of the union, the witness told Martinez that he (the employee witness) was not in favor of the union.

Objection 12

In this Objection, the Employer asserts that on the day of the election, a supervisor and/or third party admitted at the polling location that he was a supervisor when questioned about his job duties by the Board agent conducting the election.

In support of this Objection, the Employer submitted the statement of an employee who contends that when David Martinez's ballot was challenged during the election on the ground that the he was a supervisor, the Board agent conducting the election asked him what he did at the plant to which Martinez replied he "supervised lines I, II, III and IV."

Objection 13

In this Objection, the Employer asserts that during the critical period, supervisors and/or third parties threatened that the Petitioner would send all signed authorization cards to the Employer if the Petitioner did not win the election.

In support of this Objection, the Employer presented the statement of an employee who states that there were rumors that if the company won the campaign, that the union was going to send the cards to the owners so they would fire the people who signed cards.

Objection 14

In this Objection, the Employer asserts that the Petitioner, through and by its agents, officers, and representatives acting on its behalf or with its implied endorsement destroyed the necessary laboratory conditions by having knowledge of and acquiescing in pro-union conduct by supervisors as defined by Section 2(11) of the Act.

In support of this Objection, the Employer relies on the evidence submitted in support of its other objections.

CONCLUSION

If the Employer can establish that supervisors, agents of the Petitioner, or third parties have engaged in the acts alleged in the Objections, such conduct may warrant setting aside the results of the election. Inasmuch as substantial and material issues of fact and law exist with respect to whether the conduct occurred, I find that the issues can best be resolved on the basis of record testimony at a hearing conducted before a duly designated hearing officer. Accordingly, I will direct that a hearing be held with respect to the Employer's Objections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14. I shall also direct that during the hearing that additional evidence be

submitted with respect to the alleged supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres.

ORDER DIRECTING HEARING

IT IS HEREBY ORDERED, pursuant to Section 102.69 of the Board's Rules and Regulations, hereafter called the Board's Rules, that a hearing be held to resolve the issues raised by the evidence submitted by the Employer in support of its Objections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14 and to obtain additional evidence as to the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres as resolution of that issue may directly impact the resolution of the Objections.

IT IS FURTHER ORDERED that the hearing officer designated to conduct the hearing will prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact and recommendations to the **Regional Director** as to the disposition of the issues. Within 14 days from the date of the issuance of such report, or within such further period as the Regional Director may allow upon written request to the undersigned for an extension of time, under the provisions of Secs. 102.69 and 102.67, either party may file with the undersigned exceptions to the Hearing Officer's Report with supporting brief. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof, together with any brief filed, on the other parties.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 1st day of July, 2013, at 1 p.m. at the Aiken County Courthouse, Courtroom #5, Second Floor, 109 Park Avenue, SE, Aiken, South Carolina, a hearing will commence before a duly designated Hearing Officer of the National Labor Relations Board on the Objections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14 and the supervisory

status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres, and will be conducted on consecutive days thereafter until completed, at which time and place you will have the right to appear, or otherwise, give testimony and to examine and cross examine witnesses.

Dated at Winston-Salem, North Carolina, this 17th day of June 2013.

Claude T. Harrell Jr., Regional Director
National Labor Relations Board
Region 10
233 Peachtree St. NE, Suite 1000
Atlanta, Georgia 30303

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS AND RECOMMENDATION TO THE REGIONAL DIRECTOR

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August 9, 2013

I. INTRODUCTION

Pursuant to Section 102.69(e) of the Board's Rules and Regulations, the Employer, by and through the undersigned counsel, hereby files these exceptions to the Hearing Officer's Report on Objections and Recommendation to the Regional Director issued on July 26, 2013.[1] The specific grounds for these exceptions and citations of authority are set forth in the Employer's supporting brief.

II. EXCEPTIONS

1. To the hearing officer's finding that the Employer "did not produce any evidence surrounding the details or the circumstances giving rise to the warnings [issued by putative supervisor Eduardo Sanchez in January] and did not introduce copies of the warnings into the record." (Report, p. 6).

2. To the hearing officer's finding that putative supervisor David Martinez "denie[d] that he has the authority to issue discipline." (Report, p. 7).

3. To the hearing officer's finding that Martinez testified that "he only issued the warning after [Production Manager Glenn] Jang directed him to do so a second time." (Report, p. 7).

4. To the hearing officer's failure to find that employee Jose Garcia also witnessed Martinez issue the warning to employee Jose Allende. (Report, p. 7).

5. To the hearing officer's finding that "[t]he evidence presented by the Employer fails to establish that the employees exercised the use of independent judgment when issuing discipline." (Report, p. 8).

[1] All dates referenced herein are in 2013, unless otherwise indicated.

6. To the hearing officer's finding that "[t]here is no evidence to establish that the purported authority extends beyond Jang's specific directions." (Report, p. 8).

7. To the hearing officer's finding that, "With respect to the warnings issued by Sanchez . . . the record fails to establish any details or circumstances explaining when or how the warnings were issued, or even who made the decision to issue the warnings." (Report, p. 8).

8. To the hearing officer's finding that "there is no evidence regarding the impact, if any, of the warnings on the job status or tenure of employees." (Report, p. 8).

9. To the hearing officer's finding that "the Employer did not introduce evidence establishing the existence of a progressive disciplinary system or otherwise explain how the warnings would be used in future disciplinary action." (Report, p. 9).

10. To the hearing officer's finding that "the Employer has failed to meet its burden of establishing that the putative supervisors exercised the authority to issue discipline to employees using independent judgment." (Report, p. 9).

11. To the hearing officer's finding that Sanchez testified that "he always checks with Jang first" before deciding if an employee can work overtime. (Report, p. 12).

12. To the hearing officer's finding that Sanchez "failed to provide the circumstances surrounding his recommendations . . . ." (Report, p. 14).

13. To the hearing officer's finding that, "As in the pre-election hearing, no evidence was presented by the Employer in the post-election hearing of the previous year's recommendations for raises, which raises were effectuated, and the reasons for denying those recommendations." (Report, p. 14).

14. To the hearing officer's finding that "the record fails to establish that the putative supervisors exercised independent judgment in making recommendations for raises, or that any such recommendations were adopted by the Employer." (Report, p. 15).

15. To the hearing officer's recommendation that Objections 8, 9, and 13 be overruled "because no evidence was proffered in support of these objections." (Report, p. 17 fn. 11).

16. To the hearing officer's finding that "no employees testified regarding Torres' attendance at union meetings . . . ." (Report, p. 23).

17. To the hearing officer's finding that the alleged interrogation by Martinez of Hammond does not amount to objectionable conduct and to her recommendation that Objection 6 be overruled. (Report, p. 27).

18. To the hearing officer's findings that "[t]he record fails to establish that Martinez engaged in objectionable conduct by moving Garcia to perform the grinder duties"; "the record fails to establish any nexus between the job assignment and Garcia's support for the Employer"; "the record fails to establish that Martinez moved Garcia to the grinder or changed his job duties because Garcia did not support the Union"; and to her recommendation that Objection 11 be overruled. (Report, p. 27).

29. To the hearing officer's finding that "Torres' alleged statement to the Board Agent during the challenge process of the election does not amount to objectionable conduct" and to her recommendation that Objection 12 be overruled. (Report, p. 28).

30. To the hearing officer's failure to find that evidence regarding phone calls between Union organizer Dionisio Gonzalez and the putative supervisors, as well as evidence that Gonzalez led meetings that the putative supervisors attended, demonstrates that the Union

had knowledge of and acquiesced in pro-union conduct by the putative supervisors; and to her recommendation that Objection 14 be overruled. (Report, p. 28).

31. To the hearing officer's failure to dismiss the petition.

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August 9, 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

CERTIFICATE OF SERVICE

I, Jonathan P. Pearson, do hereby certify that I have on this 9th day of August, 2013, served a copy of the Employer's Exceptions To Hearing Officer's Report On Objections And Recommendation To The Regional Director upon the following by email:

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s/Jonathan P. Pearson
Jonathan P. Pearson

UNITED STEELWORKERS
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of	)	
	)	
PAC TELL GROUP, INC. D/B/A U.S. FIBERS	)	Case No. 10-RC-101166
	)	
Employer	)	
	)	
And	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	)	
	)	
Petitioner,	)	
	)	

PETITIONER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON OBJECTIONS AND RECOMMENDATION TO THE REGIONAL DIRECTOR

Respectfully submitted on this 9th day of August, 2013

Brad Manzolillo
Organizing Counsel
United Steelworkers
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Pursuant to the National Labor Board's ("Board") Rules and Regulations 102.69, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO, CLC, ("USW" or "the Union") takes these Exceptions to the findings, rulings, and relief recommended by Hearing Officer Rosetta B. Lane, as set forth in her July 26th, 2013 Report for the above-captioned case (cited as "Report"). The Union has filed a brief in support of these Exceptions. The Union excepts to the following findings and failures to find facts and conclusions of law, rulings, and remedies as set for the in the Report:

1. To the recommendation of the Hearing Officer that the Regional Director sustain the Employer's Objections and direct a second election. (Report at 3). This recommendation is based upon multiple incorrect findings of law and fact.

2. To the finding of the Hearing Officer that the record establishes that the four putative supervisors possess at least one of the primary indicia of supervisory status. (Report at 3). This finding is based primarily upon an incorrect finding that the putative supervisors have supervisory authority to assign.

3. To the finding of the Hearing Officer that the Employer met its burden in establishing that the putative supervisors possessed primary indicia to assign and to responsibly direct. (Report at 5). The Hearing Office failed to provide any analysis of whether or not the putative supervisors engaged in responsible direction. The Hearing Officer also based this on an incorrect reading of

independent judgment in assigning.

4. To the finding of the Hearing Officer that the authority of the supervisors to direct the work of the employees, to grant days off, and to assign employees to work overtime, has a substantial impact on the daily work lives of employees. (Report at 13). Again, the Hearing Officer failed to distinguish between having the authority to responsibly direct and to assign as dealt with in Oakwood Healthcare, Inc., 348 NLRB 686 (2006). The Hearing Officer has also failed to consider the *ad hoc* or very occasional nature of any granting of days off or the evidence that the putative supervisors typically check in with a their supervisors on any issue of granting days off. Finally, the Hearing Officer has failed to consider the distinction between granting overtime to volunteers and mandating overtime.

5. To the finding of the Hearing Officer that the duties of the putative supervisors reflect that the assignment, by necessity, requires the use of independent judgment. (Report at 13) When the evidence is applied to Board law, it is clear that not only do the putative supervisors not "assign", but they don't use independent judgment in directing.

6. To the finding of the Hearing Officer that the evidence establishes that the putative supervisors assign work and exercise independent judgment in doing so. (Report at 13). Again, when the facts are applied to Board law, it is clear that they

are not using independent judgment.

7. To the erroneous recommendation of the Hearing Officer that "Objections 1, 2, 3, 4, 6, 10, 11, and 12 be sustained." (Report at 17). The correct listing of the Objections sustained by the Hearing Officer is on page 28 of the Report, which states "I recommend that the Regional Director sustain Objections 1, 2, 3, 4, and 10." (Report at 28).

8. To the conclusion of the Hearing Officer that Objection 1 should be sustained. (Report at 22).

9. To the finding of the Hearing Officer that the testimony of a witness that putative supervisor Lal mentioned "the union form" in a conversation with two unidentified employees supports a conclusion that this conversation constituted the solicitation of union authorization cards. (Report at 19, 21, 22).

10. To the finding of the Hearing Officer that "the nature and degree of authority held by the putative supervisors supports a finding that their prounion conduct as described below 'reasonably tended to coerce or interfere with employees' exercise of free choice in the election.'" (Report at 20). The Hearing Officer improperly relied on Madison Square Garden, 350 NLRB 117 (2007). The Hearing Officer failed to consider precedent interpreting Harborside Healthcare, 343 NLRB 906, 914 (2004).

11. To the improper consideration by the Hearing Officer of putative supervisor Jose Lal's unobjectionable activity, including attendance and remarks at union meetings, to support a finding that Lal's conduct with respect to union authorization cards "had a reasonable tendency to coerce and interfere with employees' freedom of choice in the election." (Report at 21).

12. To the finding of the Hearing Officer that "the parties presented no evidence relating to" mitigation of supervisory pro-union conduct by the Employer's anti-union campaign. (Report at 21). The Hearing Officer failed to consider evidence in the record showing mitigation.

13. To the finding of the Hearing Officer that Jose Lal has supervisory authority sufficient to render the solicitation of cards objectionable. (Report at 20, 22). The Hearing Officer failed to apply precedent holding that the solicitation union authorization cards by supervisors is inherently coercive only where it is targeted at employees working directly under the supervisor's authority.

14. To the assumption of the Hearing Officer that the challenged ballots were all cast against the Union. (Report at 21).

15. To the finding of the Hearing Officer that an alleged remark by David Martinez constitutes "prounion conduct." (Report at 22).

16. To the conclusion of the Hearing Officer that "representations about Employer

wages and benefits" made by the putative supervisors are relevant to an analysis of the conduct alleged in Objection 4. (Report at 23). The Hearing Officer ignored the clear language of Objection 4, which alleges that the putative supervisors made "misrepresentations." (Objections at 4).

17. To the finding of the Hearing Officer that the subjective opinion of a witness as to the meaning of a remark by David Martinez supports a conclusion that Objection 10 should be sustained. (Report at 24, 25, 26).

18. To the finding of the Hearing Officer that Martinez "made statements to employees directly under their [*sic*] supervision ... threatening that there could be discharges." (Report at 22, 25, 26). The Hearing Officer failed to consider Board law holding that statements like those allegedly made by Martinez are objectively not threats and noncoercive.

19. To the finding of the Hearing Officer that statements by Martinez "encouraging employees to support the Union," "advising employees that the Union was a good option for all and that employees would receive better pay and treatment," and "to 'think well' about their votes" supports a conclusion that Objections 2, 3, 4, and 10 be sustained. (Report at 25, 26). The Hearing Officer failed to apply precedent holding that these statements are unobjectionable, particularly when made by a low-level supervisor.

20. To the finding of the Hearing Officer that attendance at Union meetings by Lal,

Martinez, and Torres supports a conclusion that Objections 2, 3, 4, and 10 be sustained. (Report at 26). The Hearing Officer failed to consider Board law holding that this conduct is unobjectionable.

21. To the finding of the Hearing Officer that statements made by Lal at Union meetings support a conclusion that Objections 2, 3, 4, and 10 be sustained. (Report at 26). The Hearing Officer failed to consider Board law holding that this conduct is unobjectionable.

22. To the finding of the Hearing Officer that the appearance by Torres in "union publication" supports a conclusion that Objections 2, 3, 4, and 10 be sustained. (Report at 26). The Hearing Officer failed to consider Board law holding that this conduct is unobjectionable.

23. To the finding of the Hearing Officer that "the nature and extent of the supervisory status of the putative supervisors supports a finding that their prounion conduct [as alleged in Objections 2, 3, 4, and 10] reasonably tended to coerce or interfere with employees' exercise of free choice." (Report at 25).

24. To the finding of the Hearing Officer that the conduct alleged in Objections 2, 3, 4, and 10 materially affected the results of the election.

25. To the recommendation of the Hearing Officer that Objections 1, 2, 3, 4, and 10 should be sustained. (Report at 22, 26).

26. To the recommendation of the Hearing Officer that a second election be held. (Report at 28).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing Charging Party United Steelworkers' Exceptions from the Above-Captioned Case was made on the following from Pittsburgh, Pennsylvania this 9th day of August, 2013.

VIA ELECTRONIC FILING

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and

Case 10-RC-101166

UNITED STEEL, PAPER, AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Petitioner

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

1. Introduction

Pursuant to a petition filed by the Petitioner on March 26, 2013[1], and a Decision and Direction of Election[2] (Decision) issued by the Acting Regional Director on May 3, an election by secret ballot was conducted on May 29 and 30. The tally of ballots reflects that 71 votes were

[1] All dates are in 2013 unless otherwise specified.

[2] One of the two issues litigated was whether four individuals, labeled by the Employer as "supervisors," were supervisors under Section 2(11) of the Act, warranting their exclusion from the unit. As set forth in the Decision, the Acting Regional Director concluded that the Employer had failed to meet its burden of establishing that the four individuals, were statutory supervisors. Accordingly, she determined they were eligible to vote in the election. On May 16, the Employer filed a Request for Review of the Decision. On May 31, the Board denied the Employer's Request for Review noting that although the Employer's Request for Review raised a substantial issue regarding the supervisory status of the four-named employees that the matter could best be resolved through the use of the Board's challenge procedure. On June 14, the Employer filed a Motion for Reconsideration of the Board's Order and asserted that the supervisory issue was not resolved by the challenge procedure. On June 26, the Board denied the Employer's Motion for Reconsideration without prejudice to the Employer renewing its arguments on exceptions to a report on objections or on a request for review of the Regional Director's decision.

cast for the Petitioner and 59 votes were cast against union representation, a margin of 12 votes, with 7 challenged ballots. On June 6, the Employer filed timely objections to conduct affecting the results of the election. On June 17, pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, I issued a Report on Objections and Notice of Hearing finding that the Employer's Objections raised substantial and material issues that could best be resolved by the conduct of a hearing.[3]

A hearing was held from July 1 through July 3 during which the Employer and the Petitioner were afforded the opportunity to submit additional evidence[4] regarding the supervisory status of the four putative supervisors, Jose Lal, Eduardo Sanchez, David Martinez, and Aduaco Torres, as well as evidence regarding the Employer's Objections. On July 26, the hearing officer issued a Hearing Officer's Report on Objections and Recommendation to the Regional Director, finding that Lal, Sanchez, Martinez and Torres are statutory supervisors based primarily on their exercise of independent judgment in the assignment of work. She also recommended that the election be set aside and that a second election should be directed based on the conduct of these supervisors as set forth in Objections 1, 2, 3, 4 and 10. She recommended that the remaining objections be overruled.

[3] In the Report on Objections, the Employer's request to withdraw objections 5, 15, and 16 was approved.

[4] In the Report on Objections, I directed the hearing office to take notice of the transcript in the pre-election hearing and the parties' submissions in order to ensure a complete record on the supervisory status of the four individuals. I further take notice of the original Decision and Direction of Election.

On August 9, both the Petitioner and the Employer filed timely exceptions to the Hearing Officer's Report[5]. In this regard, the Petitioner excepts to the hearing officer's finding that the four putative supervisors are statutory supervisors and to the hearing officer's recommendation that the putative supervisors engaged in prounion conduct which warrants setting aside the election based on the Board's decision in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004). The Employer agrees with the hearing officer's finding that the putative supervisors possess the supervisory authority to assign work but excepts to the hearing officer's finding that the putative supervisors do not have the supervisory authority to issue discipline to employees or to effectively recommend discipline and that they cannot effectively recommend raises. Further, while the Employer agrees with the hearing officer's recommendation that certain of its objections be sustained and a second election directed, the Employer contends that Objections 6, 8, 9, 11, 12, 13 and 14 should also be sustained[6]. Finally, the Employer contends that the prounion conduct by the putative supervisors supports a dismissal of the petition.

For the reasons discussed below, I disagree with the hearing officer's findings and recommendations that the four putative supervisors are statutory supervisors based on their authority to assign work. Rather, I find merit to the Petitioner's exceptions and find that the Employer has failed to meet its burden to establish that the four putative supervisors are supervisors as defined by the Act because the record evidence is insufficient to support such a conclusion. Accordingly, I have determined that the prounion activity by the putative

[5] The Employer filed 31 exceptions and the Petitioner filed 26 exceptions to the Hearing Officer's Report. I have considered all of the parties' exceptions but find it is unnecessary to address each specific exception in this Supplemental Decision.

[6] The Employer did not file exceptions to the hearing officer's recommendation that objection 7 be overruled because there was no evidence submitted in support of that objection.

supervisors did not constitute objectionable conduct, and I am overruling the Employer's objections and will issue a certification of representative.

2. The Employer's Operations[7]:

The Employer's Trenton, South Carolina facility (Trenton facility)[8] consists of four separate buildings, commonly referred to as buildings 1, 2, 3 and 4, where it is engaged in the processing and manufacture of recycled polyester fiber. Ted Oh is the Vice-president (VP) of Operations and is responsible for overseeing the Employer's operations, including both the Trenton and Lauren facilities. Oh's office is located at the Trenton facility where he spends a majority of his time[9]. Kevin Corey is the Director of Manufacturing for the Trenton facility and reports directly to Oh. Jay Alcorta is the Safety Manager for the Trenton facility and also serves as the Plant Manager for the Laurens facility. Alcorta works about one day per week at the Trenton facility and spends the rest of the week at the Laurens facility. Admitted supervisors Glenn Jang and Kyong Kang both work as the Production Managers at the Trenton facility and report directly to Corey. Putative supervisors Sanchez, Lal and Martinez report directly to Jang. In this regard, Sanchez and Lal work on rotating 12-hour shifts in what is referred to as the extrusion area while Martinez works in the recycling operation. Putative supervisor Torres works in the finishing area and reports directly to Kang.

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[7] Employer's Exhibit 1, which was entered into the record at the pre-election hearing, contains an organization chart of the Employer's operations. VP Oh testified that he prepared this diagram specifically for the hearing in order to facilitate his testimony.

[8] The Employer has another facility about 75 miles away in Laurens, SC. As set forth in the pre-election Decision, that facility was determined not to share an overwhelming community of interest with the petitioned-for Trenton facility and is not included in this proceeding. The Employer did not file a request for review concerning that determination.

[9] According to the pre-election Decision, the last time that Oh visited the Laurens facility was sometime in 2012.

There are about 137 employees employed at the Trenton facility and they work on 12-hour shifts, rotating between the day and night shifts about every three months. Thus, Lal and Sanchez rotate their shift assignments so that when Lal is working on the day shift, Sanchez is working on the night shift. The record reveals that there are approximately 50 employees assigned to the extrusion area and therefore about 25 employees work on each shift. Martinez testified that there are about 26 employees who work in the recycling operation, which would equate to about 13 employees per shift. According to the testimony of VP Oh, putative supervisor Martinez works on the day shift and Jose Ferro supervises the night shift[10]. Specifically, in response to questions as to whether Ferro is a lead person, Oh testified that this is a "gray area because he's been acting supervisor." There are about 40 employees who work in the finishing area, about 20 employees per shift, and putative supervisor Torres testified he rotates his shift assignment with Edwin Vicente, who is listed by the Employer as Finish Lead Man. Vicente testified that he works as the supervisor's helper. Torres testified that he works with about 12 employees on his shift and about 12 employees work on the other shift[11].

3. Background:

VP Oh testified at the pre-election hearing that in about September or October, 2012, the four putative supervisors officially became supervisors. In this regard, Oh testified that in September, 2012 he held one-on-one meetings with each of the four putative supervisors and that Safety Manager Alcorta served as the Spanish translator since none of the putative supervisors spoke English fluently. Oh testified that the purpose of the meeting was to determine whether the putative supervisors wanted to be promoted to supervisor and to tell them

[10] According to Employer's Exhibit 1, Jose Ferro is listed as the " Recycle Operation High Lead Man" and there was some testimony that he serves as "acting supervisor", although the record does not disclose his job responsibilities.

[11] According to VP Oh, the remaining employees work in the shipping and maintenance area.

what the Employer wanted them to do. In this regard, VP Oh testified that the Employer's "expectations" were "to make sure that they're the chain link between the managers and the operators, that they have to make sure [sic] dealing with the workforce, fluent communication, plus make sure that they have to look out for the welfare of the plant employees." Additionally, Oh testified that the Employer relies on the putative supervisors to serve as translators since they speak Spanish and about 90% of the workforce only speaks Spanish while the Employer's managers, with the exception of Alcorta, are not fluent in Spanish but speak either English or Korean. Additionally, Safety Manager Alcorta testified that during these meetings[12] he told the putative supervisors they would be responsible for "preparing the work schedules, preparing the production schedules, all the different stats, look for people to make sure the shift is fully staffed, apply overtime when necessary and recommend discipline." Alcorta did not testify with any specificity concerning each of these job responsibilities.

VP Oh testified that subsequent to these meetings he announced to employees at a weekly safety meeting held sometime in October, 2012, that Sanchez, Lal, Martinez and Torres had been promoted as supervisors[13]. According to Alcorta, Oh told employees that the four putative supervisors would be responsible for the different areas of the plant. Oh further testified that at about the time of their promotions, the putative supervisors were given a .75 cent hourly pay increase.

Contrary to the above testimony, Lal was the only putative supervisor who testified that he attended a one-on-one meeting with VP Oh and Safety Manager Alcorta. In this regard, Lal

[12] Alcorta served as a Spanish translator during the meetings.

[13] The record contains conflicting testimony from employee witnesses concerning when the Employer conducted this meeting. For example, lead person James Hammond who works in the recycling operation corroborates Oh's testimony. However, employees Ventura Perez and Aaron Zamorano testified that Oh conducted this meeting in May, prior to the pre-election hearing, and Jose Garcia, testified that the meeting occurred about two years ago.

testified at the pre-election hearing that he told Oh and Alcorta that he accepted the position of "leader". Lal stated that following his promotion he was no longer assigned to a specific group working on a machine and since that time Manager Jang gives him a list of jobs that needs to be done and that he walks around to make certain that the work gets completed.

Sanchez denies ever attending a one-on-one meeting with Oh and Alcorta. Specifically, Sanchez testified that he began working for the Employer in 2007 and has been a supervisor for two years. Although he does not recall a meeting in October 2012, as described by the Employer, he does recall being present at a meeting where Manager Jang and Mr. Kim[14] told about four to five employees that they had to listen to Sanchez because he was their boss. The record does not contain any further information concerning this meeting or the date that it occurred. Torres testified that he began working for the Employer in about June 2010 and that he is currently employed as a "leader." Likewise, Martinez, who has worked for the Employer for about five years, testified that his current position is "leader", helping the supervisor, and that he has held this position for about one year. Neither Torres nor Martinez testified concerning a meeting that was conducted with each of the putative supervisors in September 2012, as described by both VP Oh and Safety Manager Alcorta.

4. Supervisory Status of the Putative Supervisors

Assignment of Work:

Contrary to the hearing officer, I find that the putative supervisors' role in the assignment of work does not require the use of independent judgment such that they would be deemed statutory supervisors. As described by the hearing officer, the work schedule is initially prepared

[14] The record is unclear who Mr. Kim is.

by Manager Jang and is periodically modified by putative supervisors Sanchez and Lal[15]. According to VP Oh, the work schedule covers about a three month period. The managers determine the number of employees that work on each shift and their assigned work areas, extrusion, recycling or finishing. Putative supervisors Lal and Sanchez then divide the employees into work groups consisting of between 3-5 employees, depending on the work area. Each work group has a lead employee, who has been designated by a manager. In this regard, Lal and Sanchez divide employees into groups by placing less experienced employees with more experienced employees. In contrast, in the recycling operation and the finishing area, Martinez and Torres do not decide how to group employees; that has already been done. The record evidence disclosed that putative supervisor Martinez is not involved with the drafting or the modifying of the work schedules. Likewise, putative supervisor Torres testified that Manager Kang assigns the work in the finishing area and Kang was not called as a witness to refute Torres' testimony.

As found by the hearing officer, at the beginning of each shift the production managers give the putative supervisors a list of orders that need to be worked on during their shift. The putative supervisors then assign the work to the employee work groups in their respective areas. The record is inconclusive regarding the level of decision making that is involved with respect to the assignment of work. However, employees testified that the work is very routine, requiring minimal supervision because once employees have learned the job, they simply know what to do. With respect to the recycling operation, Martinez testified that the four employees in each work group rotate so that each employee has a turn on the grinder, which is the least desirable job because of the dust that is produced during the process. During the shift, the putative supervisors

[15] A copy of the work schedule was entered in the record at the pre-election hearing as Employer Exhibit 3.

may decide to move an employee to a different machine. However, this decision is generally dictated by a machine breaking down or an employee being absent, which creates a vacancy in a work group. With respect to a machine break down, VP Oh testified that the group lead will contact the putative supervisor to look at the problem. If the putative supervisor is unable to fix the problem then a production manager, Jang or Kang, is called into assist. The managers will decide whether to try and fix the machine or call a maintenance team to handle it. It is undisputed that during the period that a machine is not operational, the putative supervisor will tell the employees to clean their work area, particularly if the break down is of a short duration. However, if the break down will be for a more significant period of time, then the putative supervisor may temporarily assign an employee to another job or machine. In this regard, Sanchez testified that he consults with Production Manager Jang after the temporary assignment is made. At the post-election hearing, Martinez testified that Jang has yelled at him for not temporarily moving employees when a machine breaks down. In contrast, putative supervisor Torres testified that he always asks for Production Manager Kang's permission prior to temporarily reassigning employees, even when it is dictated by a machine break down.

As described by the hearing officer, when an employee is absent from work, the putative supervisor obtains the permission of their respective manager, Jang or Kang, to call in an employee to work overtime. The record evidence establishes that the putative supervisor makes the decision concerning the selection of who to call in for work, based on who they know is available and wants to work overtime. However, because the Employer does not have mandatory overtime, the putative supervisor has no authority to require an employee to work. Additionally, at times, an employee may request voluntary overtime and the record discloses that if the putative supervisor is aware that there is overtime work available, then the employee's

request is granted. The record evidence is unclear regarding how often employees are temporarily reassigned or called in to work overtime.

Direction of Work:

I find that the record evidence fails to establish that the putative supervisors satisfy the supervisory indicia of "responsibly direct" as defined by the Act. In this regard, the record evidence establishes that the nature of the work is routine, requiring minimal instruction, and there is insufficient evidence that the putative supervisors are held accountable for the employees' performance.

The record evidence establishes that throughout the shift the putative supervisors walk around their work areas to make certain that the work is getting done and to assist employees. In this regard, the putative supervisors give the employees their work orders based on the production list that they have received from the production managers. The record clearly establishes, based on employee testimony, that the nature of the work is routine and once employees receive their assignments they know what to do without receiving further instruction. During the shift, the putative supervisors may be needed to get materials and temporarily move employees around when a machine breaks down.

In the extrusion area, the group leads complete an "Extruder Report" which contains certain information such as temperature, barrel speed, product amount, and product type for each work group. Based on VP Oh's testimony, the task of completing this report is very clerical in nature requiring no discretion, since the group leads simply copy the numbers from their machines and the putative supervisors review the reports for accuracy. The group leads' name appears at the top and the putative supervisor, either Lal or Sanchez, places their name at the bottom beside the word "completed". VP Oh testified that Lal and Sanchez review the production report to make certain that the "operation was running as smooth as possible, trying

to find discrepancy[sic]- and if they find any issue with the report, that they do not- they'll try to conduct an investigation to make sure that what has happened, making sure what happened." This report is then given to Manager Jang who reviews the report, makes any necessary changes, and then signs his name next to the space marked "supervisor". When asked about the production report, Jang testified at the pre-election hearing that he is responsible for production. It does not appear that putative supervisors Martinez and Torres review a similar type of report for their work areas.

Finally, there was some testimony from Production Manager Jang concerning whether the putative supervisors are held accountable for production. Jang testified, in a very general manner, that putative supervisors will be held responsible for production and will receive warnings if production is not satisfied but it has not happened before.

Discipline of Employees

In agreement with the hearing officer, I find that the record evidence fails to establish that the putative supervisors possess the supervisory authority to effectively recommend discipline or to issue discipline as defined by the Act. In this regard, there is insufficient evidence to support a finding that, when discipline was issued to employees by the putative supervisors, that they used sufficient independent judgment to satisfy the primary indicia of a statutory supervisor.

In addition to the factual findings of the hearing officer, at the pre-election hearing, both VP Oh and Safety Manager Alcorta testified that the putative supervisors could recommend discipline and that this was communicated to each of them during the October 2012 meetings. However, a review of the pre-election transcript discloses that both Oh and Alcorta gave very general testimony with only conclusory statements, lacking specific detail about what a recommendation of employee discipline coming from the putative supervisors means. Production Manager Jang's testimony at the pre-election hearing sheds some light on the role the

putative supervisors play in the discipline of employees. In this regard, Jang testified that the putative supervisors "use warning. They suspend people for like a week." However, I note that the record evidence is devoid of any instances of employee suspensions. Moreover, the record evidence establishes that the four putative supervisors were not involved in the discipline of any employees until February, when Lal issued warnings to two employees for safety violations as described in the hearing officer's report.

Manager Jang testified regarding each of the six warnings which were entered into the pre-election hearing as Employer's Exhibit 2. Specifically, Jang testified that the warning dated January 21st was issued to Juan Perez and that he completed the warning and signed it and that none of the putative supervisors were involved. With respect to the two warnings purportedly issued by Lal to employees Quinones and Smart for safety violations, Jang testified that he was not certain who filled it out that it was either Lal or Sanchez but Jang admits to signing the bottom in the space reserved for the supervisor's signature. Jang did not testify regarding the circumstances that resulted in these warnings or how it was determined that discipline was appropriate except to state that "supervisors told me things and I did it then." However, as described by the hearing officer, at the pre-election hearing, putative supervisor Lal offered more detailed testimony regarding these two warnings and testified that Jang had supplied him with blank warning forms and told him that every person not satisfying safety and/or work requirements should be written up. Lal admitted that he issued written warnings to employees Christopher Quinones and Gerron Smart in February 2013 for failing to wear safety equipment. As found by the hearing officer, the warning issued to Quinones was at Jang's direction because it was based on Jang having observed the employee not wearing his safety glasses and that Lal did not observe the infraction. With regard to the warning issued to Smart, on the same date, this also involved a failure by the employee to wear his safety glasses and, as noted by the hearing

officer, Lal only issued the warning because he was fearful that Jang would be mad at him for not doing so. Although the hearing officer found that Jang was not involved in the warning issued to Smart, it is significant to note that both warnings bear Jang's name in the space reserved for "supervisor" and Lal's name is not contained on the warning. Manager Jang was not called to offer further testimony to refute Lal's testimony.

With respect to the three warnings issued by Sanchez on March 19th, I find partial merit to the Employer's exception and correct the hearing officer's factual findings and note that the Employer had entered these warnings into the record as part of Employer Exhibit 2 at the pre-election hearing. In this regard, at the pre-election hearing Sanchez was not called as witness but Jang testified that he thought Lal or Sanchez completed these three warnings, wrote his (Jang's) name on the warning and issued them but did not know the details. At the objections hearing, Sanchez testified that he has the authority to discipline employees and that he issued these warnings to three employees, who were working in the same group, because they failed to correctly "check all of the product". The Employer contends in its exceptions that the hearing officer erred in finding that the Employer, with respect to the warnings issued by Sanchez, "did not produce any evidence surrounding the details or the circumstances giving rise to the warnings." While it is clear that these warnings were entered into the record and both Jang and Sanchez were questioned about them, I find that their testimony concerning these warnings was very general and lacked sufficient detail concerning the circumstances that led Sanchez to determine that discipline was warranted. Thus, the evidence is insufficient to determine how much judgment was required of Sanchez when he decided to issue these warnings or, whether it was of a routine nature similar to the situation with the warnings issued by Lal as described above.

With respect to the warning issued by putative supervisor Martinez on May 3rd, as described by the hearing officer, Martinez testified that he did not want to issue the warning to the employee for the safety violation but, only did so at Manager Jang's directive. Although the hearing officer stated that the warning contains Martinez's signature, a review of the warning shows that if only contains in printed form "David", Martinez's first name, and there is no record testimony concerning who completed the warning. Moreover, Manager Jang was not called as a witness to refute Martinez's testimony.

Finally, with respect to the warning issued by putative supervisor Torres on April 24th, as with Martinez, the hearing officer found that Torres only issued the warning at the direction of his supervisor, Production Manager Kang. Torres testified that he did not fill out the warning and was directed to sign it in "Kevin's" office[16]. Again, the Employer failed to call either managers Kang or Kevin Corey to refute Torres' testimony.

Finally, I find merit to the Employer's exceptions and disagree with the hearing officer's finding that "there is no evidence regarding the impact, if any, of the warnings on the job status or tenure of employees."[17] Rather, although the Employer admittedly does not have a written progressive disciplinary system, putative supervisor Sanchez testified that too many written warnings could lead to termination. Specifically, Sanchez testified that too many warnings would lead him to "talk it over with my supervisors" and "could lead employees to lose their job". However, there is no documentary evidence of employees being issued any other type of discipline beyond a first warning.

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[16] It is assumed, based on the complete record, that Torres was referring to Kevin Corey, Director of Manufacturing.

[17] Hearing Officer Report at pg. 8

Recommendation to Grant Employee Raises[18]:

The record evidence establishes that the Employer grants employees pay raises two times per year, usually about April and October. As described by the hearing officer, putative supervisors Lal, Sanchez and Martinez, participated in the preparation of a list which contained the employees' names and, next to some of the employees' names, an amount of ".50" cents was written which the Employer contends constitutes the putative supervisors' recommendation concerning the respective employee's pay raise. Additionally, next to some of the employees' name was an "I" but none of the witnesses could state with any certainty what that notation meant. In addition to the factual findings made by the hearing officer, Production Manager Jang testified that when he received the list from the putative supervisors he always makes changes and then he gives the list to VP Oh who makes the final decision concerning the raises. As noted by the hearing officer, putative supervisor Torres does not participate in pay raises for the finishing area. According to VP Oh, this is because Production Manager Kang is more "hands on." The record testimony was inconclusive concerning how the putative supervisors decided to give almost all employees a fifty-cent raise and what Jang and Oh did with the recommendation. Although VP Oh testified that the putative supervisors' recommendation is followed about 90% of the time there was no testimony concerning when this occurred, whether it was after Jang made changes to the list and whether there was any independent investigation conducted.

5. Analysis

For the reasons set forth below, I find that the Employer has failed to meet its burden of establishing that the four putative supervisors' role in the assignment and direction of work,

[18] The Employer took exceptions to the hearing officer incorrectly stating that the Employer failed to introduce additional evidence at the post-election hearing on the issue concerning the putative supervisors' role in recommending raises. I find merit to the Employer's exceptions but note that the hearing officer properly considered all of the evidence that was introduced on this issue based on facts set forth in the Hearing Officer's Report.

discipline and granting of raises to employees satisfies the definition of "supervisor" as contained in Section 2(11) of the Act[19]. In this regard, while I find that the putative supervisors are involved in assigning work, including selecting employees to work overtime, directing employees in their jobs, issuing written warnings and providing input for bi-annual pay increases, the Employer failed to show that such conduct by the putative supervisors required the use of independent judgment within the meaning of the Act.

Section 2(11) of the Act defines "supervisor" as:

> any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, a person will be found to be a statutory supervisor if he or she possesses any one of the above functions or is able to effectively recommend such action. Moreover, it is well established that "the burden of proving supervisory status rests on the party asserting that such status exists." *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1047 (2003). Accordingly, in this case, the burden is on the Employer to establish that each of the putative supervisors satisfies the statutory definition of supervisor and the Employer must do so by "a preponderance of the evidence". *Dean & Deluca New York, Inc.,* supra, 1047.

With respect to the assignment of work, the Board has held that the authority to "assign" refers to "the act of designating an employee to a place (such as location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant

[19] The secondary indicia of supervisory status noted by the hearing officer are not dispositive in the absence of evidence indicating the existence of any of the primary indicia of such status. *Billows Electric Supply of Northfield, Inc.,* 311 NLRB 878, fn 2 (1993); *McClatchy Newspapers,* 307 NLRB 773 (1992). Thus, the evidence of secondary indicia will not be discussed in this Supplemental Decision.

overall duties, i.e. tasks...not an ad hoc instruction that the employee perform a discrete task." *Croft Metals, Inc.*348 NLRB 717, 721 (2006). In this case, the putative supervisors do not draft the work schedule or assign employees to specific shifts or work areas, i.e. extrusion, recycling or finishing. Rather that is done by the production managers, Jang and Kang. While putative supervisors Lal and Sanchez may make some changes to the schedule, the record evidence is inconclusive regarding exactly what changes they make. Rather, it appears that Lal's and Sanchez's modifications to the schedule involve assigning employees on their respective shifts to work groups. While this involves some judgment on their part, I find that it is of a more routine nature since they group employees to include inexperienced employees with experienced employees. Further, Martinez and Torres do not have any responsibilities with assigning their employees into work groups or modifying the work schedule. Also significant, is that the employees essentially perform the same type of work every day and any temporary assignments made by the putative supervisors are dictated by machine break downs or absences. In the case of absences, the putative supervisor may call in an employee to work overtime after they obtain the approval of the production manager. Although the putative supervisors decide who to call, the record is devoid of sufficient details concerning how that decision is made or the frequency in which it occurs. See *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Rather, the putative supervisors testified that they just know who to call.

With regard to the responsible direction of employees in their work, I also find that the Employer has failed to meet its burden of establishing that the putative supervisors exercise independent judgment such that their role is not merely routine or clerical in nature. In this regard, the record evidence establishes that the production managers give the putative supervisors a list of production orders that need to be worked on during their shifts. While the putative supervisors may decide how to disperse the orders to the different work groups, the

evidence establishes that the nature of the work is very routine and repetitive and that the employees need almost no instruction from the putative supervisors on how to do the work. Further, the record is inconclusive regarding whether there is a significant difference between the various work orders such that some orders may be more onerous than others. Thus, the record evidence is inconclusive regarding what factors the putative supervisors consider when deciding how to complete the work orders assigned to their shifts. See *Croft Metals, Inc.,* supra, fn. 14, citing *Franklin Home Health Agency,* 337 NLRB 826, 831 (2002) ("The degree of independent judgment is reduced when directing employees in the performance of routine, repetitive tasks.") Thus, the role of the putative supervisors in the production process appears to be more of a lead person in the sense that they spend much of their time walking around the work area to make certain that employees are performing their jobs, have the necessary materials to do so and attend to any machine break downs. Finally, there is insufficient evidence that the putative supervisors are held accountable for meeting productivity standards. In this regard, VP Oh testified, that the Employer does not have any production quotas. While putative supervisor Martinez testified that manager Jang "yells" at him to increase productivity, there is no evidence Jang's yelling contained any threats of discipline. In fact, the record is devoid of any evidence that the putative supervisors have been disciplined or suffered any other adverse employment action for failing to meet productivity standards. Thus, I find that the evidence is insufficient to establish that the putative supervisors are held accountable for the performance of their shifts.

Regarding the discipline of employees, in agreement with the hearing officer, I find that the Employer failed to show that the putative supervisors exercised independent judgment when carrying out this responsibility for the reasons that she cited. The strongest evidence in support of the Employer's contention was the testimony elicited from putative supervisor Sanchez concerning his job responsibilities and the three warnings that he issued to employees for failing

to check product. However, I find that Sanchez's testimony regarding his job responsibilities often amounted to conclusory responses to leading questions. Likewise, his testimony regarding the warnings lacked detail to the extent that I am unable to determine the amount of discretion, if any, Sanchez used when making the decision to issue the discipline since there was no explanation about what "checking product" involves; i.e. whether it is a routine, discrete task or something more. See *G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc., f/k/a the Wackenhut Corporation,* 358 NLRB No. 160, pg. 2 (2012) (Finding that the general testimony concerning the issuance of discipline, without more, does not establish the use of independent judgment). Moreover, I find that this case is factually distinguishable from *Metro Transport LLC d/b/a Metropolitan Transportation Services, Inc.,* 351 NLRB 657 (2007), the case cited by the Employer in support of its exceptions. In *Metro Transport,* the putative supervisor had been recently promoted into a maintenance manager position and the Board found that the Employer clearly communicated to the putative supervisor that in his new position that he had the authority to "send employees home, write them up, or terminate them" if they did not follow his directives. *Metro Transport,* supra, 660. In this case, based on the testimony of VP Oh, Safety Manager Alcorta and Production Manager Jang, the putative supervisors, at most, were told they could recommend discipline and issue warnings. However, this vague testimony does not establish whether the recommendations will be followed independent of any investigation by the Employer or, whether issuing warnings is based on any independent judgment by the putative supervisors or merely issuing warnings in response to an employee's failure to follow an established work rule, such as a failure to wear safety glasses as in the case of Lal. The Board has held that a "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of

higher authority, or in the provisions of a collective-bargaining agreement." *G4S Regulated Security Solutions,* supra, citing *Oakwood Healthcare, Inc.,* 348 NLRB 686, 693 (2006).

Finally, I agree with the hearing officer's finding that the evidence concerning the role played by putative supervisors Lal, Sanchez and Martinez in the granting of bi-annual pay raises, was insufficient to establish that they have the authority to effectively reward employees. Rather, the Employer failed to produce sufficient evidence to establish what happened to this employee list of raises once the putative supervisor gave it to the upper-level managers. While there was testimony from Production Manager Jang that he makes changes to the list and that he then gives it to VP Oh who makes the final decision, their testimony was inconclusive concerning how much the putative supervisors' recommendations factored into the final decision. See *Shaw, Inc.*, 354 NLRB 357 (2007).

The Objections

Inasmuch as I have found the four putative supervisors not to be supervisors under Section 2(11) of the Act, I do not need to address the Employer's objections which involve the prounion conduct by the four putative supervisors. Accordingly, the Employer's objections are overruled.

Conclusion

For the reasons set forth above, I find the Employer has failed to establish that Jose Lal, Eduardo Sanchez, David Martinez, and Aduaco Torres are supervisors within the meaning of Section 2(11) of the Act and that the Employer's objections are therefore without merit. Accordingly, I will issue a Certification of Representative.

ORDER

IT IS HEREBY ORDERED that the Employer's objections to the election be overruled in their entirety. Accordingly, as the Petitioner has received a majority of the votes cast, I will issue an appropriate Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898, and said labor organization is certified as the exclusive collective-bargaining representative of the employees of the Employer in the following unit within the meaning of Section 9(c) of the National Labor Relations Act, as amended:

> All full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees, employed by the Employer at its Trenton, South Carolina facility, excluding all other employees, including office clerical employees, professional and confidential employees, guards and supervisors as defined in the Act.

RIGHT TO REQUEST REVIEW

Under the provisions of Sections 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the request for review or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted

to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111-102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **September 27, 2013, at 5 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website **is accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[20] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

To file the request for review electronically, go to www.nlrb.gov, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could

[20] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, D.C., and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or faster manner as that utilized in filing the request with the Board.

not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Issued at Winston-Salem, North Carolina this 13th day of September 2013.

Claude T Harrell Jr

Claude T. Harrell Jr., Regional Director
Region 10, Subregion 11
National Labor Relations Board
4035 University Parkway, Suite 200
Winston-Salem, NC 27106

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and **Case 10-RC-101166**

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Petitioner

AFFIDAVIT OF SERVICE OF: Supplemental Decision and Certification of Representative, dated September 13, 2013.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **September 13, 2013,** I served the above-entitled document(s) by **regular mail** and **electronically** and upon the following persons, addressed to them at the following addresses:

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September 13, 2013
Date

Jane P. North, Designated Agent of NLRB
Name

/s/ Jane P. North
Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

EMPLOYER'S REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

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Attorneys for Employer

September 27, 2013

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TABLE OF AUTHORITIES

I. INTRODUCTION

Pursuant to Section 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, Pac Tell Group, Inc., d/b/a U.S. Fibers (the Employer), by and through the undersigned counsel, hereby files this request for review of the Regional Director's Supplemental Decision and Certification of Representative (Supplemental Decision) issued on September 13, 2013.[1]

II. PROCEDURAL BACKGROUND

A. PRE-ELECTION

On March 26, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7898 (the Union) petitioned to represent a unit of all production and maintenance employees at the Employer's Trenton, South Carolina facility. A hearing was held on April 18 to determine whether a question concerning representation existed. An issue at the pre-election hearing was whether Production Supervisors Eduardo Sanchez and Jose Lal, Recycle Operation Supervisor David Martinez, and Finish Supervisor Aduaco Torres (collectively, the putative supervisors) were "supervisors" under Section 2(11) of the National Labor Relations Act.

On May 3, the Acting Regional Director issued a Decision and Direction of Election finding, inter alia, that the putative supervisors were not statutory supervisors. The Employer filed a request for review (pre-election request for review) of that determination on May 16.

B. ELECTION

An election was conducted on May 29-30. The tally of ballots showed 71 votes for and 59 against the Union, with 7 challenged ballots. The putative supervisors were all challenged by the Employer's observer during the election.

[1] All dates referenced herein are in 2013, unless otherwise indicated.

C. POST-ELECTION

On May 31, the Board issued an order acknowledging that the Employer's pre-election request for review "raises a substantial issue with respect to the supervisory status of Eduardo Sanchez, Jose Lal, David Martinez, and Aduaco Torres," but concluding that the issue "may best be resolved through the use of the Board's challenge procedure." Consequently, the Board denied the Employer's pre-election request for review.

On June 6, the Employer timely filed objections to conduct affecting the results of the election based on the open and pervasive union organizing activities of the putative supervisors prior to and on the day of the election.

On June 14, the Employer filed a motion for reconsideration of the Board's May 31 Order denying the pre-election request for review because the "substantial issue" the Board acknowledged the Employer raised regarding the supervisory status of the putative supervisors was not resolved by the challenge procedure as contemplated by the Board. Further, the Employer pointed out, the existence of new evidence that was not available at the time of the pre-election hearing justified granting the Employer's pre-election request for review.

On June 17, the Acting Regional Director, after reviewing both parties' submissions, directed a hearing on Objections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, and 14.[2]

On June 26, the Board issued an order denying the Employer's motion for reconsideration "without prejudice to the Employer renewing its arguments as to the alleged supervisory status of [the putative supervisors] on exceptions to a report on objections or on a request for review of the Regional Director's decision."

[2] The Employer withdrew Objections 5, 15, and 16 prior to the hearing.

A hearing on the objections was held on July 1-3. Both parties filed post-hearing briefs on July 10.

On July 26, the hearing officer issued a Report on Objections in which she found that the putative supervisors were statutory supervisors based on their authority to assign and responsibly direct employees and that they engaged in continuous, pervasive, and aggressive pro-union campaigning up to and including the date of the election, which interfered with employee free choice. Consequently, she recommended that the Regional Director sustain Objections 1, 2, 3, 4, and 10 and order that a second election be held.

On August 9, both parties filed exceptions to the hearing officer's Report on Objections. The Union excepted to the hearing officer's findings that the putative supervisors were statutory supervisors and engaged in prounion conduct sufficient to overturn the results of the election, as well as her recommendation that a second election be held. The Employer excepted to the hearing officer's failure to find that the putative supervisors also have the authority to discipline and reward employees (or effectively recommend such action) under Section 2(11) and her recommendations that Objections 6, 8, 9, 11, 12, 13, and 14 be overruled and that the petition not be dismissed.

On September 13, the Regional Director issued his Supplemental Decision in which he disagreed with the hearing officer's findings that the putative supervisors have the authority to assign and responsibly direct employees, but agreed with her findings that the putative supervisors are not authorized to discipline and reward employees (or effectively recommend such action). Having, therefore, determined that the putative supervisors are not Section 2(11) supervisors, the Regional Director declined to address the putative supervisors' misconduct, including whether their conduct as "third parties" was sufficient to overturn the election.

Accordingly, the Regional Director overruled the Employer's objections and issued a Certification of Representative.

III. GROUNDS FOR REVIEW

The Board should grant the Employer's request for review of the Supplemental Decision because (1) substantial questions of law and policy are raised because of the absence of, and departure from, officially reported Board precedent in the Supplemental Decision; and (2) the Regional Director's decisions on certain substantial factual issues are clearly erroneous on the record, and such errors prejudicially affected the rights of the Employer and, by extension, the employees in the voting unit.

IV. FACTUAL BACKGROUND

A. OVERVIEW

The Employer owns and operates a traditional synthetic fiber manufacturing operation in Trenton, South Carolina, under the name of U.S. Fibers (Pre. Tr. 14-15).[3] It has been in operation since approximately 2004 (Pre. Tr. 23). The plant covers approximately 500,000 square feet in four buildings (Pre. Tr. 112). Each building has multiple production lines (Pre. Tr. 31). At the time of the election, there were around 140 hourly employees working at the plant (Pre. Tr. 14-16).

B. OPERATIONS

The Employer obtains raw polyester waste products from various industrial sources and reprocesses them into fibers for a variety of uses (Pre. Tr. 15-16). Raw material consists largely of waste polyester yarn, waste polyester film, and "lump and chunk," which consists of large pieces of solid waste polyester (Pre. Tr. 15).

[3] This brief discusses evidence submitted at both the pre-election and objections hearings. Testimony from the pre-election hearing will be cited as "(Pre. Tr. __)." Testimony from the objections hearing will be cited as "(Objs. Tr. __)."

When "lump and chunk" arrives at the plant it is initially cleaned and ground to a fine consistency. When waste yarn and film arrives it is put through a process called "densification," which also results in it becoming a smaller, more uniform particle. (Pre. Tr. 16-17.) This part of the process is referred to as the recycling operation.

Once the raw material is ground or densified, it is placed in an extruder and forced through a spinneret. The material exiting the spinneret falls vertically and is wound into drums. (Pre. Tr. 17-18.) This part of the process is referred to as the extrusion operation.

Following extrusion, the cans of fiber are moved to a creel area where the fiber is dried, cured, and cut. Depending on the end use, the extruded fiber can be made into different colors, links, or diameters. (Pre. Tr. 18-19.) This part of the process is referred to as the finishing operation.

C. ORGANIZATIONAL STRUCTURE

Ted Oh is the Employer's Vice President of Operations. Reporting directly to him is Director of Manufacturing Kevin Corey. Reporting directly to Corey are Production Manager Glen Jang and Production and Quality Assurance Manager Kyong Kang. (Pre. Tr. Emp. Exh. 1.)

Putative supervisors Sanchez and Lal are Production Supervisors in the extrusion operation. They both report to Jang. Putative supervisor Martinez is the Recycle Operation Supervisor in the recycling operation. He also reports to Jang. Putative supervisor Torres is the Finish Supervisor in the finishing operation. He reports to Kang. (Pre. Tr. 28-30, Emp. Exh. 1.)

D. PUTATIVE SUPERVISORS

Sanchez, Lal, Martinez, and Torres were officially promoted to supervisor around October 2012. Oh and Safety Manager Jay Alcorta met with the four men individually,

discussed their proposed change in status, and asked them if they would be willing to become supervisors (Pre. Tr. 81-82, 171-172).[4]

Oh explained to the putative supervisors that their expected duties included "[p]reparing work schedules, preparing the production schedules, all the different stats that we would have on our shift, look for people to make sure we had a full shift, apply overtime when it was necessary, recommend discipline, and different things like that" (Pre. Tr. 172). Oh specifically told the putative supervisors that they would be required to exercise independent judgment in making decisions (Pre. Tr. 82).

All of the putative supervisors accepted the promotion, although, Alcorta recalls, one was initially hesitant because he was unsure whether he could perform the required duties (Pre. Tr. 172-173). Alcorta could not recall which putative supervisor this was (Pre. Tr. 172-173). The putative supervisors were awarded pay increases as a result of the promotion (Pre. Tr. 40, 83).

Oh officially announced that the four putative supervisors had been promoted to supervisor during a group meeting with the hourly employees in October 2012. Alcorta translated during the meeting. (Pre. Tr. 135, 171.)

Sanchez and Lal each supervise approximately 25 employees on their respective shifts. Those 25 employees are divided into teams of between three and five employees, depending on what part of the extrusion operation they work in. Each team is assigned a lead operator. (Pre. Tr. 34-35.) The leads are "[b]asically . . . more experienced operators" (Pre. Tr. 35). Oh explained that "they have operational responsibility as far as making sure everything is right and they are more skilled than the rest of the team" (Pre. Tr. 35).

[4] Alcorta was involved principally as a translator (Pre. Tr. 82). The Employer's operations are complicated by language issues. Oh speaks Korean and English fluently, but almost no Spanish. Jang speaks Korean fluently, very little English, and no Spanish. (Pre. Tr. 28.) The putative supervisors speak Spanish and limited English. The hourly employees in the plant generally speak Spanish or a **Guatemalan dialect** of Spanish and either very little English or no English at all. (Pre. Tr. 169-170.) Alcorta speaks English and Spanish fluently, which is why he generally communicates to employees during meeting (Pre. Tr. 169-170).

Martinez supervises approximately 22 employees, including seven leads (Pre. Tr. 34, Emp. Exh. 1).

Torres supervises approximately 40 employees, including eight leads (Pre. Tr. 34, Emp. Exh. 1).

The Employer normally operates 24 hours a day with two, 12-hour shifts (Pre. Tr. 32). At all relevant times in the extrusion operation, Sanchez supervised the day-shift and Lal supervised the night-shift (Pre. Tr. 28-29). Martinez rotates supervising the day-shift and night-shift recycle operation (Objs. Tr. 310-311). Torres supervises the night-shift finishing operation (Objs. Tr. 370).

Jang and Kang normally work six days per week, from 8:00 a.m. to 6:00 p.m. (Pre. Tr. 43; Objs. Tr. 57). Thus, there are significant periods of time at the Employer's plant when no managers are present. A putative supervisor is always working when the managers are not. (Pre. Tr. 43.)

The putative supervisors are not assigned a particular location and do not perform significant production duties. They may occasionally fill in for an employee if necessary during an emergency, but their primary job is to move through their area of responsibility and supervise employees. (Objs. Tr. 35-36, 69, 92, 162, 187, 209, 285.)

The record is undisputed that the four putative supervisors are regarded as supervisors by the employees. Employee John Williams testified that he has always been told that Sanchez is a supervisor and has seem him exercise supervisory functions. Williams also has no "doubts" that Lal is a supervisor. (Objs. Tr. 71.) Employee Carlos Vicente similarly testified that there is no question in his mind that Sanchez and Lal are supervisors (Objs. Tr. 94).

Employee Jose Perez testified as follows regarding why he believes Torres and Lal are supervisors: "Because they give overtime to people. They can discipline people. And if we need to ask for a day off, we just talk to them about it, you know, and they automatically give us a day off" (Objs. Tr. 292). Employees Luke Milburn and Edwin Vicente likewise testified that they see Torres as a supervisor (Objs. Tr. 270, 286).

Employee Ignacio Bamaca testified that he has no "doubt" that Martinez is a supervisor because he goes to Martinez for any problems he has (Objs. Tr. 165). Employee Jose Garcia similarly testified that there is no question in his mind that Martinez is his supervisor (Objs. Tr. 189), as did employee Wilfredo Gonzalez, who explained that he knows Martinez is his supervisor because he has to "take orders" from him (Objs. Tr. 203). Employee Jose Allende testified that he sees Martinez as his supervisor because, "He gives me my hours. He tells me what to do" (Objs. Tr. 235). Employee Carlos Ortiz also believes that Martinez is his supervisor (Objs. Tr. 258). Ortiz testified that Martinez can "assign overtime, move employees around from one location to another, give employees a day off, and recommend raises" (Objs. Tr. 257).

V. SUMMARY OF ARGUMENT

The Regional Director's determination that the putative supervisors do not have the authority to assign, responsibly direct, discipline, or reward employees (or to effectively recommend such action) as contemplated by Section 2(11) disregards and misconstrues record evidence and Board precedent. Moreover, it defies common logic and ignores reality.

In essence, the Regional Director is saying the Employer operates multiple production lines in four very large buildings spanning 500,000 square feet, 24 hours a day, with only two people (Jang and Kang) who can exercise independent judgment to discipline, reward, or tell 140 hourly employees (in a language they do not understand) when, where, and how to work every

day. No traditional manufacturer with a conventional top-down organizational structure operates in that fashion, and the Employer is no exception.

Even worse, the Regional Director's determination effectively condones the putative supervisors' coercive, threatening, and intimidating conduct. Regardless of their status as Section 2(11) supervisors or "third parties" under Board law, the putative supervisors' conduct disrupted the laboratory conditions and interfered with employee free choice in the election.

Consequently, the Board should grant the Employer's request for review and reverse the Regional Director's Supplemental Decision.

VI. ARGUMENT

A. SECTION 2(11) SUPERVISORS

1. Applicable Standard

Section 2(11) of the Act defines a "supervisor" as:

> any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the United States Supreme Court adopted the following three-part test for determining whether an individual is a "supervisor" under Section 2(11):

> Employees are statutory supervisors if (1) they hold the authority to engage in *any 1 of the 12* listed supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.

Kentucky River, 532 U.S. at 713 (emphasis added). The burden of proving that an individual is a supervisor rests on the party alleging that supervisory status exists. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *Kentucky River*).

A party can prove the requisite supervisory authority either by demonstrating that they actually performed a supervisory action or by showing that they effectively recommended that it be done. Id. To prove that the authority is exercised using independent judgment, "an individual must, at a minimum, act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692-693. A "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. at 693.

Applying these principles here, the record evidence unequivocally establishes that the putative supervisors are statutory supervisors by virtue of their authority to assign, responsibly direct, discipline, and/or reward employees (or to effectively recommend such action).

2. Authority to Assign

The Regional Director disagrees with the hearing officer's finding that the putative supervisors have the authority to "assign" as contemplated by Section 2(11). His findings and conclusions in this regard are based on a misunderstanding of the facts and a misapplication of Board law.

In *Oakwood Healthcare*, 348 NLRB at 689, the Board held that "assign" for purposes of Section 2(11) refers to the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." To establish "independent

judgment," the authority to assign must be "independent [free of the control of others], it must involve a judgment [forming an opinion or valuation by discerning and comparing data], and the judgment must involve a degree of discretion that arises above the routine or clerical." *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006) (quoting *Oakwood Healthcare*).

a. Putative supervisors prepare the work schedules using independent judgment

The Regional Director first finds that the putative supervisors do not assign employees to a place or time under *Oakwood Healthcare* because they "do not draft the work schedule or assign employees to specific shifts or work areas, i.e. extrusion, recycling or finishing." Rather, he concludes, "that is done by the production managers, Jang and Kang." (Supplemental Decision, p. 17). These findings of fact are clearly erroneous on the record.

Production employees normally work rotating 12-hour shifts. There is a day-shift and a night-shift. Every few months a shift schedule is posted identifying which employees have been assigned to which shift. The shift schedule also identifies what work groups the employees have been assigned to and what buildings they will work in each week while the schedule is in effect. Contrary to the Regional Director's findings, *the putative supervisors are responsible for preparing the actual schedules, including assigning employees to a place and time.*

To substantiate the putative supervisors' authority to make these initial work assignments, the Employer introduced a copy of a recent shift schedule at the pre-election hearing (Pre. Tr. Emp. Exh. 3). As the schedule illustrates, the employees are assigned to either the day- or night-shift, they are divided up into groups A, B, and C, and then those groups are assigned to a particular building. The uncontradicted testimony is that putative supervisors Sanchez and Lal prepared the schedule introduced into evidence. (Pre. Tr. 48, 139-141, 150, 167.)

The Regional Director mistakenly concludes that the production managers rather than the putative supervisors prepare the work schedules because he misunderstands Jang's testimony. Jang testified that he developed the original *format* for the shift schedules several years ago. He explained, however, that since then, the putative supervisors have been responsible for the content of the schedules, including deciding which employees will work on which shifts and in what areas. (Pre. Tr. 166-167.)

The following uncontested testimony from Jang could not have been more clear on the subject:

Q. And so [Sanchez] and [Lal] decide what employees work on what shift?

A. Yes.

(Pre. Tr. 167.)

Bolstering Jang's testimony, employee John Williams testified that Sanchez "always did the work schedule" (Objs. Tr. 68). He described the following instance where he actually observed Sanchez making out the schedule:

Q. Have you seen Eduardo Sanchez make a schedule?

A. Yes.

Q. Well, how does he make the schedule?

A. That one particular time he just sat right there at the table on the job, and he got everybody's name and he just made it out, and then he print them out and pass them out to everybody.

Q. So when he made the schedule and passed it out, did you have to comply with the schedule?

A. Yeah, well, I had to get him to explain it to me because I didn't understand a lot of what he was saying as far as the shift was concerned. So he got it to where I could understand it, and then he would start posting it.

(Objs. Tr. 79-80.)

That the putative supervisors prepare the work schedules on their own accord is also consistent with Alcorta's testimony that during the October 2012 meeting when Vice President Oh promoted the putative supervisors, he specifically told them they would be responsible for among other things, "[p]reparing work schedules" (Pre. Tr. 172).

Consequently, the Regional Director's finding that the putative supervisors do not prepare the work schedules or decide who is assigned to what shift and what area is directly contradicted by the record.

b. Putative supervisors assign and reassign employees using independent judgment

In addition to preparing the work schedules, the putative supervisors use independent judgment in assigning employees to work groups and making reassignments where necessary to maintain safe and efficient production.[5]

The Regional Director opines as follows with respect to the authority of Sanchez and Lal to assign employees to work groups: "While this involves some judgment on their part . . . it is of a more routine nature since they group employees to include inexperienced employees with experienced employees" (Supplemental Decision, p. 17). Contrary to the Regional Director's conclusion, assigning employees to groups based on their relative skills and experience is anything but "routine."

In *Oakwood Healthcare*, the Board specifically held that the "independent judgment" element of the Section 2(11) analysis is met when supervisors assign work based on their subordinates' relative skills and experience. In finding that charge nurses in the emergency department used independent judgment to assign nursing personnel to certain areas in the department, the Board explained, "[W]here the charge nurse makes an assignment based upon

[5] The Regional Director correctly points out that Martinez and Torres do not assign employees to work groups as do Sanchez and Lal. Such a finding, however, should not have precluded the Regional Director from finding that Sanchez and Lal are statutory supervisors based on their authority in that regard.

the skill, experience, and temperament of other nursing personnel and on the acuity of the patients, that charge nurse has exercised the requisite discretion to make the assignment a supervisory function requiring the use of independent judgment." *Oakwood Healthcare*, 348 NLRB at 698. See also *American River Transportation Co.*, 347 NLRB 925 (2006) (individuals found to be supervisors where they have the authority to make assignments and reassignments of crew based on determination of which crew members perform best in certain positions).

Here, as in *Oakwood Healthcare*, the putative supervisors make and modify work assignments based on their subjective evaluation of each employee's respective ability as to be applied to the particular task at hand. Most telling on this issue is Lal's testimony that he and Sanchez group employees based on their "experience" (Pre. Tr. 225), which Lal later described as follows:

> Q: What do you mean by experience?
>
> A: They work better, and they know a little bit more about the materials.
>
> Q: Okay. And did you and [Sanchez], working together, decide that they were better workers and they knew more about the material?
>
> A: Yes.
>
> Q: Did you consider whether they knew how to operate different machines or just one machine?
>
> A: Yes.

(Pre. Tr. 227.)

The Regional Director inexplicably ignores the above testimony from Lal in favor of his own narrow construction of the term "experience" as simply referring to an employee's tenure. In the Regional Director's mind, then, deciding whether employee *A* has been employed longer than employee *B* requires no independent judgment. A plain reading of Lal's testimony,

however, reflects that he and Sanchez take into account much more. Lal's testimony makes clear that, at a minimum, he and Sanchez assign employees to work groups based on their own evaluation of how good the worker is, how knowledgeable he is about the materials being produced, and whether he has the skills to operate more than one machine.

That Lal's and Sanchez's decisions in making and changing group assignments involve independent judgment is further confirmed by Lal's testimony that he and Sanchez sometimes disagreed about the assignments: "Between the two of us, . . . he would have his opinion and I would have mine, and we would talk, and then we would agree on something" (Pre. Tr. 205). Of course, if preparing or modifying the schedule did not involve any independent judgment and was merely a routine task, Lal and Sanchez would not have had differences of opinions when carrying out the task. Moreover, there is no evidence that the putative supervisors consult a manager to resolve these differences when they arise.

Employee John Williams offered a concrete example of how putative supervisor Sanchez's subjective evaluation of his "experience" resulted in him being moved to an entirely different building on one occasion. Williams explained that the work in Building Number 1 is generally more difficult than the work in Building Number 3. He said that one time he was originally assigned to work in Building Number 1, but Sanchez thought that he did not have enough experience for that side, so he moved him back to Building Number 3. (Objs. Tr. 76.) There could be no more direct evidence of a supervisor's authority to "designat[e] an individual to a place (such as a location . . . .)" as this. *Oakwood Healthcare*, 348 NLRB at 689.

The Regional Director next fails to explain how the putative supervisors' role in reassigning employees when machines break down or when employees are absent does not require the use of independent judgment. Relocating employees to different jobs involves on-

the-spot decision-making to maintain safe and efficient production. It also requires the putative supervisor to quickly decide whether the employee is competent to perform the necessary task. See *NLRB v. Prime Energy Ltd. Partnership*, 224 F.3d 206, 211 (3rd Cir. 2000) ("[T]he record shows that Shift Supervisors weighed the relative urgency of immediate and unforeseen problems and directed Plant Operators to undertake necessary tasks. In so doing, they are performing a section 2(11) activity with independent judgment and without the guidance of routine.").

The record is clear (and conventional wisdom suggests) that the putative supervisors make reassignment decisions on a regular basis without any support from, or consultation with, the production managers. Again, because the Employer operates 24 hours a day using two, 12-hour shifts, there are significant periods of time when Jang and Kang are not at the plant. Thus, it is entirely unreasonable to assume that the putative supervisors in charge during those periods call Jang or Kang before moving anyone around.

Putative supervisor Sanchez added compelling insight on this issue. He testified:

Q: As a supervisor, can you move employees around from one location to another if you determine it's required?

A: Yes, I've done it.

Q: Why do you move employees from one location to another? Can you give us an example of why you do that?

A: If somebody is ill and cannot come to work, then I can move an individual to that group to complete the group.

Q: Do you have to ask anybody permission before you move employees?

A: I'll do it, but then I'll consult with my supervisor.

Q: *Can you move employees around based on your own judgment?*

A: Yes.

(Tr. 28-29) (emphasis added).

The Regional Director completely ignores the above uncontradicted evidence, which is crucial to the Section 2(11) analysis. The putative supervisors exercise independent judgment in deciding who has the requisite skills and experience to work in a particular area on a particular machine, and they make regular judgment calls on the priority and efficacy of reassigning tasks. Consequently, the Regional Director erred in failing to find that the putative supervisors have the authority to assign.

3. Authority to Responsibly Direct

The Regional Director next concludes, contrary to the hearing officer, that the putative supervisors do not "responsibly direct" employees under Section 2(11). In this regard, the Regional Director finds that "the nature of the work is routine, requiring minimal instruction, and there is insufficient evidence that the putative supervisors are held accountable for the employees' performance." (Supplemental Decision, p. 10). The Regional Director's findings and conclusions are once again clearly erroneous.

The fact that employees generally know how to perform their jobs or even that their jobs are routine in nature does not mean that their supervisors do not responsibly direct their job performance as contemplated by Section 2(11). In *Croft Metals, Inc.*, 348 NLRB 717 (2007), the Board found that lead persons at a manufacturing facility "directed" their crew members as that Section 2(11) term was defined in *Oakwood Healthcare*. The Board explained, "as part of their duties, the lead persons are required to manage their assigned teams, to correct improper performance, move employees when necessary to do different tasks, and to make decisions about the order in which work is to be performed, all to achieve management-targeted production goals." Id. at 722. Moreover, "lead persons instruct employees how to perform jobs properly,

and tell employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filed and production completed in a timely manner." Id.

Like the supervisors in *Croft Metals*, the putative supervisors manage their assigned teams, correct improper performance, move employees when necessary, instruct employees on how to perform their jobs properly, and tell them what order to perform tasks in. Unlike the supervisors in *Croft Metals*, however, the putative supervisors direct employees using independent judgment. Lal's testimony could not have been more clear on the issue: "Yes. I tell them what they are going to do and how they are going to do it" (Pre. Tr. 222).

With reference to Lal and Sanchez, employee John Williams testified, "Well, those [Lal and Sanchez] were the only ones that would give directions and tell everybody what needs to be done" (Objs. Tr. 63-64). Employee Carlos Vicente similarly stated that he receives his orders from Lal and Sanchez (Objs. Tr. 126). Employee Edwin Vicente testified that Lal is the "person who tells others what to do at work" and that Torres would give directions when the machines were not working or when he did not have enough materials (Objs. Tr. 281, 284).

With reference to putative supervisor Martinez, a number of witnesses testified that he gives them their work orders on a daily basis. Employee Tillman testified that ever since he was hired, Martinez has been telling him what to do on the job (Objs. Tr. 132, 183). Employee Bamaca testified, "Ever since I started on my date, I have received my orders from [Martinez]" (Objs. Tr. 152), and "I have to wait to be told by [Martinez] whether I need to work at one machine or a different machine" (Objs. Tr. 176). Employee Jose Garcia confirmed that Martinez "is the one who tells us what to do" and tells the workers what they will be doing on a daily basis (Objs. Tr. 179-181). Employee Wilfredo Gonzalez testified that Martinez "tells me [what to do] and I have to take orders from him" (Objs. Tr. 203). Employee Jose Allende testified that when

he arrives to work, he waits for Martinez to "tell [him] what to do" (Objs. Tr. 224). Employee Carlos Ortiz testified that Martinez "is the one that I take my orders from" (Tr. 249).

Finally, employee Jose Perez testified that everyday when he arrives at work, he gets with Torres to get instructions on what materials were going to be used to get instructions on production (Objs. Tr. 296).

Not only do the putative supervisors tell employees what to do, they are held responsible when employees do not perform as instructed. The putative supervisors review the production reports prepared by lead people to make "sure that the operation was running as smooth as possible, trying to find a discrepancy – and if they find any issue with the report, that they do not – they'll try to conduct an investigation to make sure that what has happened, making sure what happened" (Pre. Tr. 113). The Regional Director references this fact in the Supplemental Decision, but he fails to explain why it does not prove the putative supervisors responsibly direct employees.

Finally, at the objections hearing, Sanchez and Martinez corroborated Jang's testimony that the supervisors are penalized if production is not satisfied. Sanchez testified that he received a verbal disciplinary warning because of an issue with the production and was told to put more attention to his work and to check the material (Objs. Tr. 52). Martinez testified that Jang "yelled at me many times" and threatened to discipline him because of production problems (Objs. Tr. 319, 344).

Consequently, the Regional Director erred in concluding that the putative supervisors do not responsibly direct employees under Section 2(11).

4. Authority to Discipline

The Regional Director next finds that the putative supervisors do not discipline or effectively recommend discipline as defined by the Act. Specifically, the Regional Director concludes there is insufficient evidence that the putative supervisors use independent judgment in issuing warnings to employees. (Supplemental Decision, p. 11.) The Regional Director misunderstands the facts and misapplies Board law in analyzing the evidence of disciplinary authority offered by the Employer.

The records from both hearings clearly establish that the putative supervisors have the authority to discipline employees and to effectively recommend discipline by virtue of their authority to issue written warnings. Lal testified that Jang gave the putative supervisors blank forms and instructed them to fill one out when employees did not satisfy safety or work requirements (Pre. Tr. 211). Lal admitted that the putative supervisors decide what offense has been committed and whether to issue a first warning, second warning, or final warning (Pre. Tr. 212).

Consistent with those instructions, the putative supervisors issued several warnings in the relatively brief time between when they were appointed as supervisors and when the initial hearing in this case took place. The Employer offered into evidence warnings issued by all four putative supervisors. The Regional Director, however, erroneously discounted each of those examples.

First, the Regional Director erred in dismissing the warnings Sanchez issued to employees Diego Perez, Andrez Guzman, and Humberto Alexandro in March for not properly checking product (Pre. Tr. Emp. Exh. 2, pp. 4-6; Objs. Tr. 43). According to the Regional Director, these warnings were the "strongest evidence" in support of the Employer's argument

concerning the putative supervisors' authority to discipline. Nevertheless, he states there was insufficient evidence concerning the amount of discretion, if any, Sanchez used when making the decision to issue the discipline because there was no explanation about what "checking product" involved. (Supplemental Decision, p. 19.)

Sanchez essentially testified that he issued the employees discipline because they failed to follow a work instruction that they check the product coming from the machines they were operating. It is quite obvious what that means – the employees were not ensuring a quality product was being produced. The Regional Director needed no additional details to determine that Sanchez was issuing discipline using independent judgment. What is important is that there is no evidence any other manager was involved in the discipline. See *General Die Casters*, 359 NLRB No. 7, slip op. at 45 (2012) (concluding that putative supervisor who was authorized to issue disciplinary warnings to employees he observed not following safety rules, such as not wearing a seat belt on equipment, exercised his authority to discipline employees using independent judgment where there was no credible evidence of involvement by anyone else).

The Regional Director next failed to properly analyze the warning issued by putative supervisor Lal to employee Quinones for failing to wear proper safety equipment. Lal's warning to Quinones plainly illustrates that the putative supervisors are supposed to be disciplining employees on their own. The record reflects that Jang only told Lal to issue the discipline because he (Lal) had not done so himself. Lal claims he "was in another building at the time" and "didn't realize [Quinones was] not using protection" (Pre. Tr. 210). Lal testified that he told Jang this when Jang "complained to [him] that why didn't [he] fill out a warning form for [Quinones] . . ." (Pre. Tr. 210). Clearly then, Jang instructed Lal to discipline Quinones because Jang thought Lal was not doing his job, not because Jang had independently made the decision to

discipline the employee and wanted Lal to simply convey the message to him. Cf. *PPG Aerospace Industries, Inc.*, 353 NLRB 223, 223 (2008) ("Where the putative supervisor serves as a conduit relaying assignments from management to the employees, the independent judgment standard is not met.") (citations omitted).

This was precisely the situation presented in *Metropolitan Transportation Services*, 351 NLRB 657 (2007), which the Regional Director makes a poor attempt at distinguishing. In that case, the Board disagreed with the ALJ's conclusion that an alleged supervisor was merely acting as a conduit for his manager's disciplinary decisions. A mechanic refused to change a tire on a van for the director of operations, who subsequently called the alleged supervisor's manager to complain. The manager in turn called the alleged supervisor and told him, "These guys work for you. You go out there and you tell them that they are to get the tire changed on the vehicle and if any one of them refuses you, you are to send them home or to terminate them." Id. at 660. The ALJ found this insufficient to demonstrate independent judgment on the alleged supervisor's part. The Board rejected this conclusion, opining as follows:

> It may well be that [the manager] told [the alleged supervisor] what to do vis-à-vis the mechanic who refused to change a tire, but [the manager] acted because [the alleged supervisor] had failed to act. Moreover, in chastising [the alleged supervisor] for his failure to exercise disciplinary authority . . . [the manager] made clear that [the alleged supervisor] was empowered to impose differing levels of discipline. Absent any suggestion that [the alleged supervisor] should consult with [the manager] (or anyone else) before acting, the determination of what discipline to impose would necessarily depend on [the alleged supervisor's] independent judgment of what the situation warranted.

Id. at 660 (citing *Oakwood*).

According to the Regional Director, *Metropolitan Transportation* is distinguishable because in that case "the putative supervisor had been recently promoted into a maintenance manager position and . . . the Employer clearly communicated to the putative supervisor that in

his new position that he had the authority to 'send employees home, write them up, or terminate them' if they did not follow his directives" whereas in this case the putative supervisors "at most, were told they could recommend discipline and issue warnings" (Supplemental Decision, p. 19). While the Regional Director correctly points out that the alleged supervisor in *Metropolitan Transportation* may have had more authority to discipline employees than the putative supervisors in this case, that fact does not alter the analysis. The Regional Director cites no authority for his conclusion that is contrary to existing Board law.

Metropolitan Transportation is significant because the alleged supervisor in that case, like Lal, failed to do his job, which was to discipline employees when they violate a work rule. Like the manager in *Metropolitan Transportation*, Jang became upset when he learned Lal had not issued a disciplinary warning to Quinones.

The Regional Director next inexplicably disregards evidence showing that Martinez exercised independent judgment in disciplining employee Jose Allende for not wearing a safety mask (Objs. Tr. 132, 153, 181, 225-226, Emp. Exh. 2). Allende and three co-workers all testified about Martinez issuing Allende the warning, and none of them testified that Jang was around or otherwise involved (Objs. Tr. 132, 153, 181, 225-226). Moreover, Martinez's name is clearly on the discipline, and Jang's is not (Objs. Tr. Emp. Exh. 2).

Martinez is the only witness who testified about Jang's involvement in the Allende incident. His testimony on the issue, however, was inconsistent and dodgy. More importantly, the hearing officer specifically discredited Martinez as a witness:

> I find that his testimony is not credible. In this regard, when questioned about his authority within the plant, he became defensive, and at times during his testimony, he stood and appears to argue with the Employer's officials who were present in the hearing room. Moreover, many of his responses to questions on direct and cross were evasive and he failed to answer the question.

(Hearing Officer's Report, p. 25). For the Regional Director to ignore the hearing officer's credibility resolution in this regard is improper.

Finally, the Regional Director erred in relying on Torres's testimony about issuing a written warning to employee Gabriel Rodriquez in April for failing to follow proper procedure (Objs. Tr. 394-395, Emp. Exh. 6). The written warning is admittedly signed by Torres, but he claims to have no recollection of it (Objs. Tr. 395). He surmised, "I mean, it could be that Mr. Kang filled them out and I signed them" (Objs. Tr. 396). This is insufficient evidence for the Regional Director to conclude that Torres was merely acting pursuant to Kang's instructions. There is simply no credible testimony to rebut the clear documentary evidence establishing that Torres disciplined Rodriquez on his own accord for failing to follow proper procedure.

Consequently, the Regional Director erred in failing to find that the putative supervisors do not possess the authority to discipline employees or effectively recommend discipline under Section 2(11).

5. Authority to Reward

As a final matter, the Regional Director concludes that the putative supervisors do not have the authority to reward or effectively recommend rewards to employees by virtue of their involvement in the raise process. In reaching this conclusion, the Regional Director failed to consider substantial evidence in the record.

Vice President Oh testified that the putative supervisors are given a list of employees to evaluate in their department twice a year. The putative supervisors are asked to indicate on the list beside each employee's name whether they recommend that the employee receive a raise and, if so, how much. The putative supervisors base their recommendations on their perception of each employee's performance. (Pre. Tr. 51.) Oh explained that raises are not issued "across-

the-board," but instead are only given to "certain employees" based on input from the putative supervisors and the production managers (Pre. Tr. 90).

Production Manager Jang confirmed Oh's testimony about the putative supervisors' role in the raise process. Jang explained that the putative supervisors were asked their opinion on the amount of the raises, and Sanchez, for example, came up with $0.50 himself (Pre. Tr. 161-162). Jang did not give the putative supervisors any established guidelines that govern raises; he simply told them to exclude new employees (Pre. Tr. 162).

Sanchez testified at length about his involvement in the raise process. He explained that he recommended raises based on whether the employee was doing a good job, was responsible, and "how much that person gives of themselves" (Objs. Tr. 34, 52). Sanchez further explained that he has recommended that certain employees not receive raises in the past, and that management has followed those recommendations (Objs. Tr. 52).

Employer's Exhibit 4 at the pre-election hearing is a copy of the raise evaluation list completed by putative supervisors Sanchez, Lal, and Martinez in April (Pre. Tr. 53). Those recommendations had not yet been reviewed by management at the time of the hearing; however, similar recommendations were reviewed in October 2012, and the record reflects those recommendations were followed 90% of the time (Pre. Tr. 147-148, 162).

The Regional Director concludes that the evidence concerning the role played by putative supervisors Lal, Sanchez, and Martinez in the granting of bi-annual pay raises is insufficient to establish that they have the authority to effectively reward employees. Specifically, he find that the Employer failed to produce sufficient evidence to establish what happened to the employee list of raises once the putative supervisors give it to upper-level managers. (Supplemental Decision, p. 20). On the contrary, the Employer offered substantial evidence on this issue.

Jang testified that once he receives the putative supervisors' recommendations, he offers his own opinion and then submits it "to the management" (Pre. Tr. 162).[6] Jang explained that he bases his opinion on, for example, an employee missing a day of work (Pre. Tr. 163). Oh testified that once he receives the recommendations, he simply ensures they are in line with what the Employer is financially able to pay (Pre. Tr. 54). While there is a limited sample size because management has only considered one list of recommended raises since the putative supervisors became involved in the process, that sample indicates that the putative supervisors' recommendations were followed 90% of the time (Pre. Tr. 148, 162).

Accordingly, the Regional Director erred in failing to find that the putative supervisors possess the authority to reward employees or effectively recommend rewards under Section 2(11).

B. THIRD-PARTY CONDUCT

It is well-established that elections are not only invalidated because of the conduct of the parties and their agents but also because of third-party conduct which interferes with the right of employees to a free and uninhibited choice in the selection of a bargaining representative to such an extent that it renders "a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *U.S. Electrical Motors*, 261 NLRB 1343 (1982); *O'Brien Memorial*, 310 NLRB 943 (1993). Employees of an employer may be considered "third-parties" for purposes of determining whether their conduct interfered with a free election. See, e.g., *Q.B. Rebuilders*, 312 NLRB 1141 (1993) (election set aside based on conduct of employee who was designated member of union's in-plant organizing committee); *Steak House Meat Co.*, 206 NLRB 28 (1973) (election set aside based on employee statements to co-workers). Here, even if the putative supervisors are not Section 2(11) supervisors, their conduct as third-parties was "so aggravated

[6] It is clear from the record that Jang was referring to Vice President Oh.

as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB at 803. The Regional Director totally ignored this issue in the Supplemental Decision.

In assessing the seriousness of third-party threats, the Board considers (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was "rejuvenated" at or near the time of the election. Id. Applying these facts, the Board should conclude that the putative supervisors' conduct – even if they are not deemed Section 2(11) supervisors – warrants setting the election aside.

First, regarding the nature of the putative supervisors' conduct, the record establishes that, inter alia, putative supervisors threatened employees with discipline/discharge if they did not vote for the Union and/or if the Union did not win. Employee Wilfredo Gonzalez reports to putative supervisor Martinez (Objs. Tr. 203). He testified that Martinez told him and approximately six co-workers that the Union "was best for all and that *if we didn't vote for the Union, the Company would let us go*" (Objs. Tr. 211 (emphasis added)).

Employee Carlos Vicente testified that he approached a group of employees putative supervisor Lal was talking to and heard Lal mention "that if the employees did not sign the union form, that basically was going to make it a lot easier for the Company to be able to let employees go" (Objs. Tr. 95).

Employee Ignacio Bamaca testified that putative supervisor Martinez told a group of about six or seven employees on their break that "if we supported the Company, that there could

be a possibility of them letting us go and that we had to think about it well" (Objs. Tr. 167-168). Bamaca felt "a lot of pressure" after that comment, in "fear of losing [his] job" (Objs. Tr. 168). He added that "we even talked about putting in applications at other companies" (Objs. Tr. 168). Bamaca further testified that minutes before it was his crew's turn to go vote, Martinez told the group of about eight employees to "think well," which he inferred meant that if they voted for the Company, "things were going to go bad" (Objs. Tr. 167).

Employee James Hammond similarly testified that Martinez made "a smart comment that if the Union win[s], then someone's probably [going to] be fired" (Objs. Tr. 139). Hammond stated this took place after the pre-election hearing but prior to the election (Objs. Tr. 139).

Second, the record establishes that the putative supervisors' threats encompassed virtually the entire bargaining unit. Not only were the threats discussed above made directly to several groups of between 6-8 employees, the evidence is that the putative supervisors attended and spoke at several union meetings at which groups of 20 employees were in attendance. Moreover, at least one putative supervisor wore a Union t-shirt and hat, which "everybody that works in the building" could see (Objs. Tr. 414).

Third, the record establishes that the threats of discipline/discharge were widely disseminated within the unit. Again, employee Bamaca explained that he "felt a lot of pressure" and "felt a lot of . . . fear of losing [his] job" (Objs. Tr. 168). He then stated, "I mean *we're talking with other co-workers* . . . we even talked about putting in applications at other companies" (Objs. Tr. 168 (emphasis added)).

Fourth, the record establishes that the putative supervisors were capable of carrying out the threats, and it is highly likely the employees acted in fear of that. As discussed above, the putative supervisors have the authority to discipline employees, and that discipline can lead to

termination. Even if the authority to discipline/discharge is not sufficient for purposes of establishing supervisory status under Section 2(11), it is nonetheless important in determining whether threats of discipline/discharge constitute objectionable third-party conduct, particularly where employees reasonably believed their putative supervisor had the authority to discipline/terminate them.

Employee Jose Allende, for example, testified:

Q. And do you know whether David Martinez can fire you?

A. Yes.

Q. How do you know?

A. Because he's a supervisor.

(Objs. Tr. 244).

Similarly, employee Jose Perez testified:

Q. Now, you said something about being able to discipline people. How do you know that [Torres] or [Sanchez] can discipline people?

A. Because Jose Lal was able to fire someone. He fired someone without consulting a manager.

Q. When did this happen?

A. It's been about seven months now. I mean I don't remember the exact date, but it's been a while.

Q. Do you know who it was that he let go?

A. Yeah, I mean I, you know, someone and he was let go, and the next day we didn't see him.

Q. Did you know his name?

A. Not exactly, because he worked in a different area.

Q. Was that in the area where Jose is at?

A. Yes, the area of Jose Lal.

(Objs. Tr. 292-293).

Additionally, the record reflects that a number of employees have either been issued written warnings from putative supervisors or have witnessed their co-workers receive warnings (Objs. 86-87, 132, 153-154, 181, 225-227, 249-250). Clearly then, employees at least reasonably believed they could be disciplined/discharged by the putative supervisors.

Finally, the record establishes that the threats were repeated as late as the day of the election (Objs. Tr. 167, 213).

The Regional Director's failure to consider and apply the third-party conduct test was clearly erroneous. As the Board in *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1954), explained: "The election was held in such a general atmosphere of confusion and fear of reprisal as to render impossible the rational, uncoerced selection of a bargaining representative. It is not material that the fear and disorder may have been created by individual employees and nonemployees and that their conduct cannot be attributed either to the Employer or to the unions. The important fact is that such conditions existed and that a free election was thereby rendered impossible."

VII. CONCLUSION

The Regional Director ignored and misconstrued substantial record evidence and established Board precedent concerning the putative supervisors' authority to assign, responsibly direct, discipline, and reward employees (or to effectively recommend such action). As a result, he turned a blind-eye to the putative supervisors' threatening and coercive conduct that permeated the workplace throughout the campaign. The Regional Director should have determined that the putative supervisors were statutory supervisors, which would have then led

him to conclude, in agreement with the hearing officer, that their prounion conduct up to and on the day of the election tainted the results in such a manner as to warrant dismissal of the petition or, at a minimum, a rerun election. Even absent a finding that the putative supervisors were statutory supervisors, however, the Regional Director should have found that their threatening conduct as third parties was so egregious that a free election was impossible. The Board should grant the Employer's request for review to correct these errors and preserve the employees' right to vote in an election free from undue coercion and intimidation.

Respectfully submitted,

FISHER & PHILLIPS LLP

s/ Jonathan P. Pearson
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Reyburn W. Lominack, III, Esquire
Santiago Alaniz, Esquire
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jpearson@laborlawyers.com
rlominack@laborlawyers.com
salaniz@laborlawyers.com
Attorneys for Employer

September 27, 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

PAC TELL GROUP, INC., d/b/a U.S. FIBERS, Employer, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898, Petitioner.	)	Case 10-RC-101166

CERTIFICATE OF SERVICE

I, Jonathan P. Pearson, do hereby certify that I have on this 27th day of September, 2013, served a copy of Employer's Request for Review of Supplemental Decision and Certification of Representative to the Executive Secretary upon the following by email:

James E. Sanderson, Jr.
President-USW Local 7898
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Manufacturing, Energy, Allied Industrial and
Service Workers International Union, Local 7898
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uswa7898@gmail.com

Dionisio Gonzalez, Organizer
United Steelworkers
International Union
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dgonzalez@usw.org

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Keren Wheeler, Esquire
Assistant General Counsel
Five Gateway Center
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kwheeler@usw.org

Claude T. Harrell Jr., Regional Director
Region 10, Subregion 11
National Labor Relations Board
4035 University Parkway, Suite 200
Winston-Salem, NC 27106

s/Jonathan P. Pearson
Jonathan P. Pearson

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and

Case 10-RC-101166

UNITED STEEL, PAPER, AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Supplemental Decision and Certification of Representative is granted as it raises a substantial issue solely with respect to whether the putative supervisors are statutory supervisors based on their authority to assign and reward. In all other respects, the request for review is denied.[1]

PHILIP A. MISCIMARRA, MEMBER

KENT Y. HIROZAWA, MEMBER

HARRY I. JOHNSON, III, MEMBER

Dated, Washington D.C., March 13, 2014.

[1] The question of whether the putative supervisors engaged in objectionable pro-union conduct remains before the Board, as resolution of that question may turn on whether the putative supervisors are supervisors within the meaning of Sec. 2(11) of the Act.

Member Hirozawa would deny the request for review in all respects

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC. D/B/A U.S. FIBERS and UNITED STEEL, PAPER, AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898	**Cases** 10-RC-101166 DATE OF SERVICE March 13, 2014

AFFIDAVIT OF SERVICE OF ORDER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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WINSTON SALEM, NC 27106-3275

Subscribed and sworn before me this 13th day of March 2014.	DESIGNATED AGENT Alisa Jones NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and

Case 10-RC-101166

UNITED STEEL, PAPER, AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Petitioner

DECISION ON REVIEW AND ORDER

On March 13, 2014, the Board granted in part the Employer's Request for Review of the Regional Director's Supplemental Decision and Certification of Representative as it raised a substantial issue with respect to whether the putative supervisors are supervisors within the meaning of Section 2(11) based on their authority to assign and reward.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully examined the entire record with respect to the issues on review, including the briefs on review, the Board has decided to affirm the Regional Director for the reasons stated in his decision.[1]

ORDER

This proceeding is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

MARK GASTON PEARCE, CHAIRMAN

KENT Y. HIROZAWA, MEMBER

[1] The Employer further contends that, even if these individuals are not statutory supervisors, the alleged conduct of two of them (David Martinez and Jose Lal) was sufficient to constitute objectionable conduct under the Board's standard for third-party conduct. Under that standard, the Board will set an election aside if the objecting party establishes that the alleged conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." Westwood Horizons Hotel, 270 NLRB 802, 803 (1984). Here, the conduct at issue consists of alleged statements by Martinez and Lal suggesting that employees might lose their jobs if they did not support the union. These types of statements are not objectionable under the standard for third-party conduct. See Duralam, Inc., 284 NLRB 1419, 1419 fn. 2 (1987) ("threats of job loss for not supporting the union, made by one rank-and-file employee to another, are not objectionable").

HARRY I. JOHNSON, III, MEMBER

Dated, Washington, D.C., September 22, 2014

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC. D/B/A U.S. FIBERS and UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL INTERNATIONAL UNION, LOCAL7898	**Cases** 10-RC-101166 DATE OF SERVICE September 22, 2014

AFFIDAVIT OF SERVICE OF DECISION ON REVIEW AND ORDER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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Subscribed and sworn before me this 22nd day of September 2014.	DESIGNATED AGENT A Jones NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. D/B/A U.S. FIBERS

Employer

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

Case 10-RC-101166

Petitioner

TYPE OF ELECTION: BOARD DIRECTED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. Timely objections were filed but were overruled by the Board[1].

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

> United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union, Local 7898

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

Unit: All full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees, employed by the Employer at its Trenton, South Carolina facility, excluding all other employees, including office clerical employees, professional and confidential employees, guards and supervisors as defined in the Act.

September 23, 2014

Claude T Harrell Jr

CLAUDE T. HARRELL JR.
Regional Director, Region 10
National Labor Relations Board

[1] On September 13, 2013, the Regional Director for Region 10 issued a Supplemental Decision and Certification of Representative. The Employer filed timely a Request for Review with the Board and on March 13, 2014, the Board granted, in part, the Employer's Request for Review. On September 22, 2014, the Board issued an unpublished Decision on Review and Order affirming the Regional Director's Supplemental Decision, thereby overruling the Employer's objections and remanded the case to the Region for further appropriate action consistent with the Board's decision.

cc: James E. Sanderson Jr., President-USW Local 7898
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NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,[1] an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

1 Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

UNITED STEELWORKERS

UNITY AND STRENGTH FOR WORKERS

District 9

Daniel Flippo
District Director

James Carvin
Assistant to the Director

October 7, 2014

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Ted Oh, VP Operations & Plant Manager
PAC Tell Group, Inc.
d/b/a US Fibers
30 Pine House Rd
Trenton, SC 29847-2010

Dear Mr. Oh:

The United Steelworkers International Union (USW) has been certified as the collective bargaining representative for the employees at your Trenton, South Carolina facility (see attached).

Therefore, pursuant to the National Labor Relations Act (NLRA), I write to request US Fibers recognize the USW as the representative of these employees and begin negotiations for a collective bargaining agreement. In addition, I write to remind you that US Fibers is required to notify the USW of any changes to the employees' terms and conditions of employment and bargain with the USW concerning these changes.

I also request that the following information be provided to Richard Thomas as representative on behalf of the union.

- Full seniority list with names of bargaining unit employees
- Date of birth for each employee in bargaining unit
- Date of hire for each employee in bargaining unit
- Classification and rates of pay for each employee in bargaining unit
- Total benefit package (i.e. pension, insurance, vacation, etc.) for each employee in bargaining unit

This information, along with dates and locations you are available to begin negotiations, should be sent to:

Richard Thomas, Staff Representative
USW District 9 Sub-District Office
111 Plaza Drive
Harrisburg, NC 28075
704.454.7065
704.454.7054 [fax]
rthomas@usw.org

Please reply by October 17, 2014 to confirm that US Fibers recognizes the USW as the collective bargaining representative for the employees at the Trenton facility. At that time, please also provide dates when you or other US Fibers representatives are available to begin negotiations for a collective bargaining agreement covering these employees.

We look forward to a long and healthy labor-management relationship with your company.

Sincerely,

Daniel Flippo
District 9 Director

cc: James Carvin
Debbie Cook
Richard K. Thomas
Donna Shaver

USFIBERS

usfibers.com
tel 803 275 5023
fax 803 275 5078

October 14, 2014

VIA CERTIFIED MAIL

Daniel Flippo, District 9 Director
United Steelworkers
PO Box 1105
Gardendale, AL 35071

Re: *PAC Tell Group, Inc. d/b/a US Fibers*
Our File No. 3253-000

Dear Mr. Flippo:

We are in receipt of your letter of October 9, 2014, requesting that US Fibers recognize the USW as the collective bargaining representative for employees of our Trenton, SC plant and commence negotiations for a collective bargaining agreement. Your letter also requests certain information which you believe would be relevant to the collective bargaining process.

The certification of election issued by the National Labor Relations Board in Case No. 10-RC-101166 was improvidently issued as a result of errors made in the decisions in the underlying case. For this reason, we are engaging in a technical refusal to bargain in order to obtain judicial review of the Board's decisions leading to the certification. We cannot, and will not, recognize USW or engage in bargaining while the review process is pending.

Sincerely,

Ted Oh
Vice President Operations & Plant Manager

TO:ct

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
10-CA-139779	10-29-14

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer		b. Tel. No.
Pac Tell Group, Inc. d/b/a U.S. Fibers		(803)275-5023
		c. Cell No.
d. Address (street, city, state ZIP code)	e. Employer Representative	f. Fax No. (803)275-5078
30 Pine House Rd Trenton, SC 29847-2010	Ted Oh, Vice President of Operations	g. e-Mail
		h. Dispute Location (City and State) Trenton, SC
i. Type of Establishment (factory, nursing home, hotel) Factory	j. Principal Product or Service Synthetic Fiber Manufacturing	k. Number of workers at dispute location 140

l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

The Employer refuses to recognize and bargain with the Union as the exclusive bargaining representative of its employees. Employees chose the Union and the Board certified the Union as the employees' representative in Case 10-RC-101166.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC and its Local 7898

4a. Address (street and number, city, state, and ZIP code)	4b. Tel. No. (412)562-2466
	4c. Cell No.
Five Gateway Center Room 807 Pittsburgh, PA 15222	4d. Fax No. (412)562-2574
	4e. e-Mail mpadias@usw.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)

6. DECLARATION **I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.**		Tel. No. (412)562-2466
By: [signature]	Mariana Padias, Esq. USW Legal Department	Office, if any, Cell No.
(signature of representative or person making charge)	Print Name and Title	Fax No. (412)562-2574
Address Five Gateway Center Room 807 Pittsburgh, PA 15222	Date: 10/28/14	e-Mail mpadias@usw.org

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary, however, failure to supply the information will cause the NLRB to decline to invoke its processes. I-1187048051

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PAC TELL GROUP, INC., D/B/A U.S. FIBERS Charged Party and **UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC AND ITS LOCAL 7898** Charging Party	**Case 10-CA-139779**

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on October 29, 2014, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Ted Oh, Vice President of Operations
Pac Tell Group, Inc. d/b/a U.S. Fibers
30 Pine House Rd
Trenton, SC 29847-2010

October 29, 2014
Date

Lisa A. Davis, Designated Agent of NLRB
Name

/s/ Lisa A. Davis
Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. d/b/a U.S. FIBERS

and **Case 10–CA–139779**

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, Local 7898 (the Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Pac Tell Group, Inc. d/b/a U.S. Fibers (Respondent) has violated the Act as described below:

1.

The charge in this proceeding was filed by the Union on October 29, 2014, and a copy was served on Respondent by U.S. mail on October 29, 2014.

2.

At all material times, Respondent has been a corporation with an office and place of business in Trenton, South Carolina, and has been engaged in the manufacture and the nonretail sale of recycled polyester fiber.

3.

Annually, Respondent, in conducting its operations described above in paragraph 2, purchased and received at its Trenton, South Carolina facility, goods valued in excess of $50,000 directly from points outside the State of South Carolina.

4.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6.

At all material times, Ted Oh held the position of Respondent's Vice President of Operations and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

7.

The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production, janitorial, warehousemen, shipping and maintenance employees, employed by Respondent at its Trenton, South Carolina facility, excluding all other employees, including office clerical employees, professional and confidential employees, guards and supervisors as defined in the Act.

8.

On May 29 and 30, 2013, a representation election was held pursuant to a Decision and Direction of Election, and on September 23, 2014, the Board certified the Union as the exclusive collective-bargaining representative of the Unit.

9.

At all times since September 23, 2014, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

10.

On October 7, 2014, the Union, by letter, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

11.

Since about October 7, 2014, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

12.

By the conduct described above in paragraph 11, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

13.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before November 26, 2014, or postmarked on or before November 25, 2014.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than two hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or

if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on a date to be determined **at the Paris Favors Hearing Room, National Labor Relations Board, Subregion 11, 4035 University Parkway, Suite 200, Winston-Salem, North Carolina,** and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: November 12, 2014

Claude T. Harrell Jr.,
Regional Director
National Labor Relations Board
Region 10, By

Scott C. Thompson
Officer-In-Charge
National Labor Relations Board
Subregion 11
4035 University Pkwy Ste 200
Winston-Salem, NC 27106-3275

Attachments

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 10–CA–139779

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Ted Oh, Vice President of Operations
Pac Tell Group, Inc. d/b/a U.S. Fibers
30 Pine House Rd
Trenton, SC 29847-2010

Mariana Padias, Esq.
Karen Wheeler, Esq.
United Steel Workers Union
Five Gateway Center, Room 807
Pittsburgh, PA 15222

Michael D. Carrouth, Esq.
Reyburn W Lominack III, Esq
Jonathan P. Pearson, Esq.
Fisher & Phillips LLP
1320 Main St, Suite 750
Columbia, SC 29201-3284

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative**. If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in**

evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. d/b/a U.S. FIBERS

and **Case 10–CA–139779**

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 12, 2014, I served the above-entitled document(s) by **certified or regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

Ted Oh, Vice President of Operations
Pac Tell Group, Inc. d/b/a U.S. Fibers
30 Pine House Rd
Trenton, SC 29847-2010

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Michael D. Carrouth, Esq.
Reyburn W Lominack III, Esq
Jonathan P. Pearson, Esq.
Fisher & Phillips LLP
1320 Main St, Suite 750
Columbia, SC 29201-3284

REGULAR MAIL

Mariana Padias, Esq.
Karen Wheeler, Esq.
United Steel Workers Union
Five Gateway Center, Room 807
Pittsburgh, PA 15222

CERTIFIED MAIL

November 12, 2014
Date

Lisa A. Davis, Designated Agent of NLRB
Name

/s/ Lisa A. Davis
Signature

7013 1090 0000 9913 2838

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
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Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

10-CA-139779
Pac Tell Group, Inc
d/b/a U.S. Fibers
Postmark Here

Complaint & NOH

Sent To: Ted Oh, Vice President ~~of Operations~~
Pac Tell Group, Inc. d/b/a U.S. Fibers
Street, Apt. No., or PO Box No.: 30 Pine House Rd.
City, State, ZIP+4: ~~Trenton, SC 29847-2010~~

PS Form 3800, August 2006 — See Reverse for Instructions

7013 1090 0000 9913 2845

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Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

10-CA-139779
Pac Tell Group, Inc
d/b/a U.S. Fibers
Postmark Here

Complaint & NOH

Sent To: ~~Mariana Padias, Esq.~~
Karen Wheeler, Esq.
United Steel Workers Union
Street, Apt. No., or PO Box No.: Five Gateway Center, Room 807
City, State, ZIP+4: ~~Pittsburgh, PA 15222~~

PS Form 3800, August 2006 — See Reverse for Instructions

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. d/b/a U.S. FIBERS	)	
	)	
and	)	CASE NO. 10-CA-139779
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898	)	

RESPONDENT PAC TELL GROUP, INC. d/b/a U.S. FIBERS' ANSWER TO COMPLAINT AND NOTICE OF HEARING

Respondent Pac Tell Group, Inc. d/b/a U.S. Fibers, by and through the undersigned counsel, hereby answers the Complaint and Notice of Hearing (Complaint), filed on November 12, 2014, as follows:

FOR A FIRST DEFENSE

Responding to initial unnumbered paragraphs of the Complaint, Respondent denies that it has committed any unfair labor practices.

1.

Paragraph 1 of the Complaint is admitted.

2.

Paragraph 2 of the Complaint is admitted.

3.

Paragraph 3 of the Complaint is admitted.

4.

Paragraph 4 of the Complaint is admitted.

5.

Paragraph 5 of the Complaint is admitted.

6.

Paragraph 6 of the Complaint is admitted.

7.

Paragraph 7 of the Complaint is denied.

8.

With respect to Paragraph 8 of the Complaint, Respondent admits that a representation election was held on May 29-30, 2013, and admits that the Board improperly certified the Union as the exclusively collective bargaining representative for the Unit on September 23, 2014, said Certification being invalid for the reasons set forth in the Objections and Exceptions in Case No. 10-RC-101166. More specifically, the Board's decisions regarding the supervisory status of four employees, and the impact of their actions during the Union's organizing campaign, were erroneous.

9.

Paragraph 9 of the Complaint is denied.

10.

Paragraph 10 of the Complaint is admitted.

11.

With respect to Paragraph 11 of the Complaint, Respondent admits that, by letter of October 17, 2014, it refused to recognize and bargain with the Union, but denies that the Union is the lawful collective bargaining representative of the Unit for the reasons set forth in Paragraph 8, above.

12.

Paragraph 12 of the Complaint is denied.

13.

Paragraph 13 of the Complaint is denied.

14.

Any allegations not expressly admitted above are hereby denied.

FOR A SECOND DEFENSE

The Complaint is invalid to the extent that it fails to state a claim upon which relief may be granted.

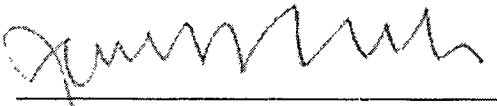
FOR A THIRD DEFENSE

Respondent reserves the right to assert new and additional affirmative defenses upon discovery of facts not previously known.

WHEREFORE, having fully answered the Complaint, Respondent requests that it be dismissed in its entirety and that Respondent be awarded its costs and attorneys' fees incurred in defense of this action, or in the alternative, that Counsel for the General Counsel be held to strict proof as to all allegations not specifically admitted.

Respectfully submitted,

FISHER & PHILLIPS LLP



Michael D. Carrouth, Esq.
Jonathan P. Pearson, Esq.
Reyburn W. Lominack, III, Esq.
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Columbia, South Carolina 29201
Telephone: 803.255.0000
Facsimile: 803.255.0202
mcarrouth @laborlawyers.com
jpearson@laborlawyers.com
rlominack@laborlawyers.com

ATTORNEYS FOR RESPONDENT

Dated this 19th day of November 2014

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PAC TELL GROUP, INC. d/b/a U.S. FIBERS	)	
	)	
and	)	**CASE NO. 10-CA-139779**
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7898	)	

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Respondent's Answer to Complaint and Notice of Hearing in the above-captioned case has been filed electronically in PDF format and served on the following via email and U.S. Mail:

Mariana Padias, Esq.
Keren Wheeler, Esq.
United Steel Workers Union
Five Gateway Center
Room 807
Pittsburgh, PA 15222
mpadias@usw.org
kwheeler@usw.org

Jonathan P. Pearson

Dated this 19th day of November, 2014.